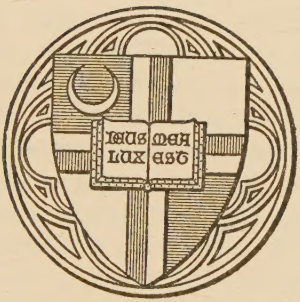
SEMINAR

Annual Extraordinary Number of
THE JURIST

Vol. XIII



Published by the School of Canon Law
THE CATHOLIC UNIVERSITY OF AMERICA
1955–1956

Published annually by the School of Canon Law, The Catholic University of America, at 111 E. Chestnut Street, Lancaster, Pa., and Washington, D. C.

Communications concerning articles, reviews, subscriptions, or changes of address, should be addressed to the Wickersham Printing Co., 111 E. Chestnut Street, Lancaster, Pennsylvania, or the Business Manager, THE JURIST, The Catholic University of America, Washington 17, D. C.

Single copies $1.00

ANNOUNCEMENT

With the present issue of SEMINAR, the School of Canon Law of The Catholic University of America brings to a close the series of annual extraordinary numbers of *The Jurist* published since 1943. When this special section was launched during World War II, there existed practically no outlet for publication of studies by American writers on historical jurisprudence and related fields. The established European journals were inaccessible, precisely at a time when interest in legal history on this side of the Atlantic had received a new stimulus, owing, in part at least, to the presence of many distinguished refugee scholars—Hitler's backhanded gift to American education, as the president of a great American university once called it.

Today, the need for a special journal of this kind no longer seems to be pressing. Articles dealing with legal history appear in increasing numbers on the pages of general historical magazines—a testimony to the ever-growing awareness, among historians, of law as an essential element in ancient, medieval, and modern civilization. European journals of Roman law and legal history, their numbers even increased since the end of the war, solicit contributions by American scholars. New channels exist for studies in comparative law and legal philosophy.

It is by no means the intention of the Editors henceforth to turn away from these fields of learning and research. In discontinuing SEMINAR, they propose from now on to include in the regular, quarterly issues of *The Jurist* the type of articles, reviews, and notes which thus far was set aside for the annual extraordinary number. Thereby they wish to indicate their belief that the study of law is ultimately one. It is the knowledge of law in all its aspects, past and present, which makes the whole jurist.

Lifetime subscribers to Seminar and others who have remitted subscriptions for future issues will receive a proportional refund at the time of publication of the present volume.

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SEMINAR

Volume XIII 1955–1956

RHETORIC AND THE LAW *

RHETORIC is a broad category. It is not limited to that form of "copia dicendi ac summum eloquentiae studium" which was suspected of bringing more evil than good to men and states. This was the κακὴ τέχνη with a καλὸν ὄνομα which helped win cases whether they were just or not, and Plato forbade it in his projected state—although he acknowledged the logical difficulty of praising δίκη but restricting ξυνδικεῖν.[1] The dialectic which led to this "art or skill or activity" (so Plato; Cicero says "art, study, skill, or gift of nature")[2] led also to that other and normally more reputable thing, philosophy. It is true that philosophy itself was not always above suspicion, but while "eloquence without philosophy is generally highly disadvantageous and is never helpful," philosophy "without eloquence does too little for the good of the states."[3] In spite of the traditional rivalry of the two activities, they are actually inseparable, and as there is rhetoric in Plato and philosophy in Isocrates, so there is nothing inconsistent in Cicero's claiming to combine both in his own person. His orator's training in *dialectica* is the fulfillment of Greek education.

* This lecture was delivered at the 1955 meeting of the American Philological Association as part of a symposium on Ancient Rhetoric. The bibliography is highly selective, and is intended only to give an indication of the present trend in the study of Roman Law.

[1] *Laws*, XI, 937 E.

[2] Plato, *Laws*, XI, 937 E; Cicero, *De Inventione*, I, 2.

[3] Cicero, *De Inventione*, I, 1 (translated by H. M. Hubbell, Loeb Classical Library).

In view of all this, it is a little remarkable that Vergil lists eloquence specifically, along with sculpture and astronomy, among the *artes* in which the Roman did not excel; "alii orabunt causas melius." At this point in Aeneid VI,[4] in his great parade of heroes in honor of the *domus divina* of Augustus, he may of course have merely overlooked Cicero. His heroes are those of Livy: Camillus, Drusus, the Scipiadae, and Cato, all of whom were qualified to carry out the Roman mission of *pacis imponere morem* and *debellare superbos,* if not always necessarily *parcere subiectis* unless that was where the financial advantage lay. (How well qualified they, or any other Roman, was *regere imperio populos* is another matter.) It is clear, however, that forensic rhetoric was not then to be mentioned favorably in the august presence.

And yet it was this same Augustus who put the final capstone, it is supposed, on Roman jurisprudence by formalizing the honored Roman *ius respondendi,* the right of giving legal advice.[5] It is therefore strange, and perhaps a little embarrassing, that Vergil does not mention the law at all, among either Roman or non-Roman arts. Surely he must have remembered the words of Cicero in the treatise on Moral Duties: [6]

> "To protect a man in his legal rights, to assist him with counsel, and to serve as many as possible with that sort of knowledge tends greatly to increase one's influence and popularity. Thus, among the many admirable ideas of our ancestors was the high respect they always accorded to the study and interpretation of the excellent body of our civil law."

[4] *Aeneid,* VI, lines 847-853.

[5] For recent discussion of this matter see A. Guarino, in *Revue Internationale des Droits de l'Antiquité,* II (1949), 401-419; W. Kunkel, in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte,* LXVI (1948), 423-457; A. Magdelain, in *Revue Historique de Droit Français et Etranger,* 4th ser., XXVIII, (1950), 1-22, 157-182; E. Schönbauer, in *Anzeiger der Akademie der Wissenschaften* (Wien, 1950), 8.

[6] Cicero, *De Officiis,* II, 65 (translated by W. Miller, Loeb Classical Library).

Precisely, such jurisconsults as Servius Sulpicius Rufus, of whom Cicero wrote, whose honors came naturally as the *boni* and *honesti* and *locupletiores* of the Republican Senate, were sought by Augustus as the supports of his rule. Why, then, did Vergil not mention the law?

We must consider this at greater length. It is a paradox precisely because, to most people, "the Law" means Roman Law. We have been brought up in awe of the *Corpus Iuris Civilis,* and learned to regard such worthies as the Mucii Scaevolae, Aelius Paetus, Antistius Labeo, Ateius Capito, and the later giants: Proculus, Sabinus, Cassius Longinus, the enigmatic Gaius, and the praetorian prefects Ulpian, Papinian, and the rest as the embodiments of legal wisdom. What Greek is worthy to stand beside the least of these? Shall we name Ulpius Dionysodorus of Oxyrhynchus, a νομικός whose προσφώνησις or *responsum* delivered regarding the status of a certain Dionysia in the last year of Hadrian was thought worthy of inclusion in her file fifty years later?[7] In his recent book on the Origins and Social Position of the Roman Jurists, Wolfgang Kunkel lists a substantial number of persons under the Empire whose Greek origin is revealed in their names, but little is known of them.[8] It is still a debated question whether the law did not actually become stagnant in the East after Constantine, when it lay in Greek hands; this view has found strong supporters in Schulz, Wolff, and Wieacker, although the earlier view of Mitteis has been urged recently by Pringsheim.[9] The efforts notably of Koschaker and Leopold Wenger to establish an Ancient Law (or Laws) to set beside or to include that of Rome have met little support, and even the concept of a Greek Law sometimes

[7] *The Oxyrhynchus Papyri,* II, no. 237.

[8] W. Kunkel, *Herkunft und soziale Stellung der römischen Juristen* (1952).

[9] F. Pringsheim, in *Journal of Juristic Papyrology,* VII/VIII, (1953/54), 163-168, with bibliography.

favored by Schönbauer has had little success.[10] The Greeks, as everyone knows, were unconscionable individualists no two of whom could ever agree with each other over anything. They could not even govern themselves, and more providentially than that they deserved such fortune were presently taken over by others who knew the art of governing them. They were doubtless better off under Rome than when independent, for they had then the opportunity of living under law.

And yet, strangely enough, while the image and likeness of the Roman Law grows ever more monumental, our contemporary Roman jurists have made it difficult to say what is Roman about it. Like the search for the *Plautinisches in Plautus,* the goal becomes ever more elusive. Wherever we search, we find much that is solid and tangible, but (God save the mark) this is Greek. Was Vergil right?

Like many great, simple, monolithic things, the Roman Law has proved upon examination to be infinitely complex. The classical, synthetical, descriptive approach represented by the great books of Radin, Buckland, and Jörs has become no longer satisfying, and Schulz' recent *Classical Roman Law* is written in the constant consciousness of history. The first step was taken in 1891 by Ludwig Mitteis in his revolutionary *Reichsrecht und Volksrecht,* although this, in turn, was preceded and prepared by the epigraphical studies of Theodor Mommsen. With the discovery of the papyrus documents in Greek from Hellenistic and Roman Egypt, a flood of new evidence became available, and the typical approach to Roman Law now is the historical. I may refer to Jolowicz' *Historical Introduction to Roman Law,* Schulz' *History of Roman Legal Science,* and to the short but clear and useful *Roman Law: An Historical Introduction* by H. J. Wolff.

[10] See for example Schönbauer's paper in the *Anzeiger der Akademie der Wissenschaften* (Wien, 1949), 17, where he contrasts the Roman law with the individual laws of the Greek cities. All scholars recognize, however, that there must have been something like a Greek *koiné,* a common business law used by commercial interests and generally enforceable.

Problems of Roman legal history crowd the pages of our legal journals and of the homage volumes for which we are ever anew indebted to the Italians above all. The study of Roman law has been placed on a new basis.

The problem can be seen most clearly if we, also, adopt the historical approach. We know little of Roman law before the XII Tables, but we may apply to it the statement of Gaius: [11] "quod quisque populus ipse sibi ius constituit, id ipsius proprium est vocaturque ius civile, quasi ius proprium civitatis." Whatever law Rome constituted for itself, and how, in the period of the kings, it was clearly designed for the *populus Romanus,* the *Quirites* alone, and was the proper *ius civile.* Obscure as this period is, the character of the law is clearly seen from its institutions. We see the *patria potestas* with its *manus* and the acquisition of property by *mancipatio.* We see the definition of a debtor's position as *nexum* or *obligatio,* giving the creditor the *ius* or right to seize, bind, and hold his person, and eventually, after a prescribed period, to sell it as a chattel, or even, if the creditor wished, to put the debtor to death; some have claimed that in the case of plural creditors, they could cut up the debtor's body and each take one piece. We see the summary nature of the procedure *in iure:* "If plaintiff summons defendant to court, he shall go. If he does not go, plaintiff shall call witnesses. Then let him take him by force. If he takes to his heels, let him lay hands on him." The pleading which followed consisted of the repetition of the exact words of the statute. Gaius reports as traditional the instance of a plaintiff who was non-suited because he substituted the word "vine" for "tree" in his plea. A vine had been broken, but the law read "tree."

This is the law of a conservative and agricultural society, with the harshness and the iron discipline which the later Romans admired as the *mores antiqui* which had made Rome great, but it is more. This rigidity and insistence on the correct word or phrase is the sign of a deeply religious mentality.

[11] Gaius, *Institutes,* I, 1.

Fas and *ius* were very close in early Roman thinking, and legal language and procedure had the force of incantation and magic—*carmina bona* which "bound" or "obligated" persons and objects rightly, just as there was a forbidden *carmen malum* which would bind them wrongly. *Ius* and *fas* were alike created by the correct ceremony and language; both operated under the sanction of the *Quirites,* the *populus Romanus,* and the former was as absolute for men as the latter was for the gods. Roman jurists deny that this was "formulaic nihilism," but no one denies that this is Roman.

It is evident that such a legal system could satisfy only a very primitive and a very devout people. It did not satisfy the historical Romans. The history of later Roman law is the story of the Romans' attempts to escape from their own straitjacket. The early stages in this struggle can be seen only dimly. The motivation initially was political necessity. In spite of the religious difficulties created by taboo, *connubium* and *commercium* were extended to the *plebs* and to the Latins, thus extending certain essential privileges of the *ius Quiritium* to elements previously outside the *civitas,* and the provisions of the law themselves, previously closely guarded secrets of the *patres,* were written down and published. All of this is reported to have taken place in the fifth century.

It is possible to do little more than guess what outside influence of a cultural or commercial nature affected these early Romans. It is generally supposed that the early commercial treaty with Carthage quoted by Polybius is genuine, and many will accept the tradition that the Decemviral Legislation which produced the XII Tables took cognizance of contemporary practices in Greece or, specifically, in Attica, but we are not on fairly secure ground till we come down to the third century. As the mistress of Italy south of the Po Valley and the possessor of overseas provinces of a high and ancient civilization, there is no doubt that Rome came now under strong foreign influence, and that this influence was

primarily Greek. Changes now occurred in Roman law based on two new attitudes, a liberal interpretation of the strict phraseology of traditional usage, and the recognition of *aequitas* or "equity," a new principle derived from *ius naturale* or the law of nature. As Pringsheim has expressed it in a recent article,[12] "The rigid form of the antique Roman law had to be surmounted." If John Doe has been enriched at the expense of Richard Roe without justification, then it is just for Richard Roe to recover. Even though he had no right, he might be given a remedy; instead of *ius*, he could receive *iustitia*.

The operation of these new principles lay in the traditional Roman *ius honorarium*, the law created in the legal process by the operation of two magistracies. Both praetors and aediles had the responsibility, in proceedings *in iure*, to listen to plaintiff and defendant and incorporate their case in the *formula*, the charge to the *iudex* or judge who had to determine the facts in the case, and whose *sententia* or findings was practically, though not legally, binding on the parties to the suit. Both magistrates and *iudex* might be, and commonly were, accompanied by a *consilium* of friends who advised them on points of law. These became the *iuris consulti* who interpreted the legal terminology, and the praetor's *formula* became the vehicle by which moral considerations entered into legal practice. Later on, Quintilian was to issue a warning against carrying this to excess: [13] "Si apud iudicium hoc semper quaeri de legibus oportet, quid in his justum, quid aequum, quid conveniens sit civitati, supervacaneum fuit scribi omnino leges." This might, in truth, nullify the action of the legislator, but it seemed to the Roman mentality preferable to the repeal of a law, and it made it possible for Rome to undertake the wider responsibilities and to enjoy the wider opportunities of her imperial position without

[12] *Revue Historique de Droit Français et Etranger*, 4th ser., XXXII (1954), 493; see also Pringsheim's comments, *Festgabe für A. Simonius*, 1955, p. 287.

[13] *Declamationes*, 264.

shocking the conservatives or seeming to turn her back on the past. As a matter of fact, since this procedure was flexible, it was possible to preserve what was desirable in the *prisca disciplina* without yielding to its awkwardness. Since the praetors and the *iudices* came from the ranks of the *nobiles,* that group could enjoy the amenities of its eminence while still controlling the commons and the soldiery. They could enforce the law according to their own advantage. They could eat their cake and have it too.

This was one contribution of the *ars boni et aequi* to Roman life; the phrase as a definition of *ius* is from the Digest, but Riccobono [14] would trace it back to the eminent Publius Iuventius Celsus of Trajan's time, and it may, of course, be even earlier. As a matter of fact, if *ius* is τὸ δίκαιον, and if this is based on a τέχνη and not on *voluntas* as both Plato and Justinian thought,[15] then we are very close to the definitions of justice prevalent in the Greek writers of the fourth century B.C., having and doing what is one's own and belongs to him. In any case, as Marcel Villey [16] remarked in a recent article on the influence of Aristotle's logic on Roman law, "No one doubts that Roman thinking was radically transformed by the invasion of Greek culture." And this culture was based on the dialectic, or better, on rhetoric. It is in Plato, Demosthenes, and Aristotle that we must look for the source of the new point of view which appeared in Rome at the time of the introduction of the formulary process.[17]

It is true that this process was not quite as capricious as I have just implied. While Roman law never recognized the force of precedent in theory, and each praetor was free to cast

[14] S. Riccobono, in *Bullettino dell' Istituto di Diritto Romano,* VIII/IX (1947), 223-235.

[15] Plato, *Republic,* IV, 433-441; Justinian, *Institutes,* I, 1.

[16] *Revue Historique de Droit Français et Etranger,* XXIX (1951), 309-328.

[17] See the papers read at the *Congresso Internazionale di Diritto Romano,* Pavia, 1934, and published in the *Atti;* and more recently, H. Coing, in *Studi in Onore di V. Arangio-Ruiz,* I (1952), 365-388.

a *formula* or indeed to publish his edict in the way which seemed to him best, both theory and practice militated against arbitrary changes. Greek legal thinking was based on the absolutes of reason and of nature, and the Roman business community could not endure chaos. The *nobiles* desired the domination which to them was, of course, their divine right, but they wanted luxury also, and the security of their investments. With the growth of the *equites* into what Hill [18] has called " the Roman Middle Class," with business interests extending throughout the area of Roman political influence and even beyond, it was necessary that there be a business law applicable to all who dealt in Rome, citizens or *peregrini* alike. Thus arose the *ius gentium* in the original sense of the term, an " international " law, " quo iure omnes gentes utuntur," as Gaius said,[19] including of course the Romans. The basis of this law was *bona fides,* a term which Pringsheim has taught us to distinguish from the Greek πίστις.[20] Here the Greek influence was equally real, though indirect. Schulz [21] describes this *fides* as the quality " which with an almost religious sanction binds a man to keep his word." Under the direction of the praetor, a *iudex* was instructed to decide what was due *bona fide,* not *iure.* This principle led the way to the development of a standing operating procedure; the *edictum tralaticium* passed on from one praetor to the next without substantial change, until the revision and codification of Salvius Iulianus under instructions from the Emperor Hadrian converted this into a literal *edictum perpetuum,* which in turn furnished all the most prominent jurists of later times with a subject for commentary.

Thus Roman law became based on considerations of justice, equity, and good faith, and since the determination of these factors in any given situation required some analysis, not

[18] H. Hill, *The Roman Middle Class in the Republican Period* (1952).

[19] *Institutes,* I, 1.

[20] *Revue Historique de Droit Français et Etranger,* XXXII (1954), 475-495.

[21] F. Schulz, *Classical Roman Law* (1951), p. 474.

only on the part of the honorable *iuris consulti* but also of the less esteemed *advocati* and *causidici,* it was evident that here too, in the judicial process, there was ample room for rhetoric. *Humanitas* also made its appearance, and Adolf Berger [22] has most recently in his monumental *Encyclopaedic Dictionary of Roman Law* pleaded for the recognition of the classical quality of the Digest's injunction: "Semper in dubiis benigniora praeferenda sunt." In doubtful cases—and what cases are not doubtful?—the judge should consider mercy, and since it is likely that the *summum ius* of one party to a suit may be the *summa iniuria* to the other,[23] we may find Cicero defending his clients with the same type of philosophical, not to say casuistical argumentation as he found in his models, the great Attic orators of the fourth century.

So rhetoric affected the jurisprudence of the praetors and the aediles of Republican Rome, and Johannes Stroux has devoted a recent volume to the process.[24] Its effect on the forms of Roman business life was equally great. Injustices under the older institutions of *manus* and *mancipatio* and *nexum* might be voided under the formulaic procedure, but why should not one avoid these difficulties before they arose? Even in primitive Rome, ways were known to negate undesirable consequences of the traditional procedures. A son might escape from his father's *potestas* by a collusive triple sale as a slave, and a wife might avoid her husband's *manus* by declining the ancient rite of *confarreatio* and blocking his *usucapio* by absenting herself from his bed and board for three consecutive days each year. These procedures may seem to reflect rather the *Tradition* and the *Phantasie* of Roman law than its *Nüchternheit,* to use the terms of Prings-

[22] A. Berger, *Encyclopaedic Dictionary of Roman Law* (1953), p. 373.

[23] On this topic of J. Stroux (*Summum Ius Summa Iniuria,* 1926) see recently H. Kornhardt, in *Hermes,* LXXXI (1953), 77-85.

[24] *Römische Rechtswissenschaft und Rhetorik* (1949). See earlier F. Lanfranchi, *Il Diritto nei Retori Romani* (1938).

heim,[25] but they were followed in the third century with more direct measures.

One path to these lay in the so-called *stipulatio,* which in its oldest form, the *sponsio,* existed as early as the Twelve Tables. It could be employed to modify the primitive cash sale, which was performed by *mancipatio* in the traditional way of striking the pan of the balance with a bronze coin, a symbolic act. This served to pass title, but it furnished no means for the introduction of limiting or qualifying provisions, in particular, the specification of the exact price of the object of sale. This lack was supplied by the *sponsio;* prior to the procedure *per aes et libram,* the seller said to the buyer: "Spondesne centum dare" (if the price were 100 asses), and the latter replied "spondeo." According to the theory of Pringsheim,[26] and admittedly the matter is highly controversial, this *sponsio* came to be used to achieve a credit sale, since the buyer's promise was not limited in time, and then, by an extension as useful as it was unpredictable and unparalleled, this *sponsio* became itself the contract, and the *mancipatio* was reduced to a mere form of conveyance.

In addition, there arose the sales contract "consensu," consensual, based on no act, no set words, but the formless manifestation of the mutual wills of the parties, and the procedure was extended to three other business transactions: lease, partnership, and agency.

The *sponsio* itself was oral, not written, and required witnesses only for proof and not for validity. It was strictly limited to Roman citizens, but so long as the technical verbs "spondes—spondeo" were not used, the procedure, now called *stipulatio,* could be used by anyone, and the promise could be made in Greek as well as in Latin. Later still, when it became the practice to write down contracts in general for ease in proof, the formal *stipulatio* became written also, and

[25] *Studi in Onore di P. de Francisci,* IV (1955), 236.

[26] *Revue Historique de Droit Français et Etranger,* XXXII (1954), 475-495.

occurs oddly embedded in very Greek documents of all sorts in the later Roman East.

So arose the so-called "classical" Roman law of the early Empire under the dual influence of Greek dialectic and imperial commerce. The influence of economic conditions has been traced in detail recently by the South African jurist, Elemer Balogh,[27] and while there is much here that is uncertain, it seems now generally recognized that the acquisition of title by adverse possession (*longi temporis praescriptio*) and the invalidation of a sale if the price is not in line with the true value of the goods (*laesio enormis*) were both taken bodily over from the business practices of the Greek East.[28] On the other hand, the influence was not all one way. It seems probable that the recognition of the responsibility of a seller for hidden defects in a slave—epilepsy, the tendency to run away, and perhaps some other things—came into the practices of the East from an aedile's edict of the second century B.C., although here, of course, we are particularly dependent on the nature of the preserved evidence. It is dangerous to employ the argument *ex silentio*. It is also dangerous to conclude that borrowing has taken place where we find similarities. A practice may arise independently in different places, or the channel of influence may be circuitous and indirect.

We are still far from understanding the development of the Roman law, and so of estimating precisely the influence upon its development of Greek legal theory and practice. We should be on stronger ground if we understood better the nature of our Greek materials. The Attic orators have been much studied for their bearing on Attic law, and there have been many attempts to define the Greek notion of δίκη and of the ἄγραφος νόμος or the νόμος κατὰ φύσιν κοινός, about which Aristotle has contributed much that is useful. Ugo Paoli[29] has

[27] *Atti del Congresso Internazionale di Diritto Romano*, II (1951), 261-355.

[28] Plato recognizes the *longi temporis praescriptio* in *Laws*, XII, 954 C.

[29] *Revue Historique de Droit Français et Etranger*, XXXI (1953), 175-199.

recently traced the influence of Greek declamation on the Roman rhetoricians, Seneca and Quintilian, and found it extensive, as we should suppose. Herwald Schmidt, a brilliant pupil of Erwin Seidl, has published an interesting study of the influence of Greek rhetoric on the legal proceedings of the courts of Roman Egypt,[30] and the discovery during the war, at a place called Dumayr in Syria, of an inscription containing the minutes of a hearing before the Emperor Caracalla serves only as the latest reminder that our sources for the rhetorical influence on Roman law are not all to be found in the Digest.[31] Maxims of Roman law, among them the famous principle "superficies solo cedit," have turned up in the papyri.[32] Greek influence on Roman law was clearly extensive but where Greek legal antiquities are poorly known, we may always wonder how it was exercised. If we find a Roman definition or principle in the papyri, for example, are we to suppose that it came there as a borrowing from the Roman administration; that it is testimony to the independent persistence of a Greek maxim borrowed elsewhere by the Romans in the formative period of their legal history; or that it was merely a common element in the thinking of Greek philosophers and rhetoricians, taught in the schools and repeated in the speeches, and in which the Romans also shared? From a fairly early time, the sons of the *nobiles* were educated in Athens or in Rhodes, and may themselves, when older, have been the unconscious agency for introducing Greek points of view into their legal thinking.

[30] *Journal of Juristic Papyrology,* IV (1950), 165-177. This is based on his unpublished dissertation, *Der Einfluss der Rhetorik auf das Recht der Papyri Aegyptens* (1949).

[31] Published by P. Roussel and F. de Visscher, in *Syria,* XXIII (1942/3), 173-200. See L. Wenger, in *Annuaire de l'Institut de Philologie et Histoire Orientales et Slaves,* XI (1941), 469-504; V. Arangio-Ruiz, in *Bullettino dell'Istituto di Diritto Romano,* VIII/IX (1947), 46-57; W. Kunkel, in *Festschrift H. Lewald* (1953), pp. 81-91.

[32] L. Wenger, in *Philologus,* XLII (1933), 254-258.

What, furthermore, was the attitude of Rome itself toward the extension of its *ius civile* into the provinces? It is evident that much depended on the provincial edict and the attitude of the individual provincial governor, much also on the activity of the actuaries who drew up the legal papers which constitute much of our evidence. It is clear, at least, that even Roman citizens in the provinces did not necessarily employ what we regard as all the essential features of the *ius Quiritium,* while on the other hand they paid close regard to such imperial regulations covering family status as the *Leges Iulia de maritandis ordinibus, Aelia Sentia,* and *Papia Poppaea.* Few now would claim that the Antonine Constitution of A.D. 212 made the use of Roman law obligatory on anyone, and it certainly did not eliminate the use of non-Roman practices, if indeed they were in every case actually non-Roman.

One great source of information for the history of Greek legal thought, and so for the place of Greek legal thinking in the Roman law, is the dialogue of Plato called *The Laws.* It was left unfinished at Plato's death, and certainly it was composed and based on materials collected by his school, in which Aristotle was then prominent. It is legal theory, but very detailed, and drew obviously on existing practices in the Greek cities, including Athens. It has been studied frequently, of course. In his recent book on *The Greek Law of Sale,* Pringsheim examines its material on the law of contract, calling attention to the provision that legal promises are not enforceable if they were given under constraint or deception, or if the promissor was prevented from compliance by circumstances beyond his control. The influence of the *Laws* in antiquity is obscure. Ernest Barker regarded it as extensive.[33] It inspired at least the name of Cicero's *Laws,* and while the substance of that unfortunately fragmentary treatise reflects Roman institutions principally, there are some echoes of Plato in it: no one may institute a private shrine

[33] So recognized by E. Barker, *Greek Political Theory* (1918).

without permission; theft of sacred objects is as bad as parricide. But Cicero's debt to Plato is too obvious to dwell on. The question is, rather, did Plato's *Laws* have any influence on the development of Roman law in its formative period, two centuries earlier?

This is a large problem, too big for us to more than mention now. Suffice it to point out that the spirit of the *Laws* is precisely that of Roman law in the time of the great Republican jurists; both show (in the words of Pringsheim) "the capacity for juridical abstraction combined with a strong grasp of reality." [34] Every relationship between man and man, and between the individual and the state, is reduced to its basic principles and subjected to a rigid analysis. Rights, privileges, duties, and wrongs are reviewed with a thoroughness which Aristotle did not surpass. There is a "Roman" clarity of concept: "Whether one kills himself with his own hand or through that of others, he himself is the slayer" recalls the Roman maxim: "Qui fecit per alium, fecit per se." [35] Specific institutions suggest those of Rome: "If one takes away into freedom someone being seized as a slave" is the Roman *vindicatio in libertatem*.[36] In other respects, Plato goes beyond Roman concepts, or those of any ancient legal system, for that matter, in providing for remedial punishment for curable offenders, including terms of imprisonment. The legislator must, he states, "make the damaged undamaged, as well as he can (*τὸ βλαβὲν ἀβλαβές, εἰς τὸ δυνατόν*); he must save what is lost (*τὸ ἀπολόμενον σώζοντα*) and straighten up the fallen and heal the dying or wounded (*τὸ πεσὸν πάλιν ἐξορθοῦντα καὶ τὸ θανατωθὲν καὶ τρωθὲν ὑγιές*)." [37] This is Christian, or modern, if you wish, but Plato was Greek, and a dialectician, and stands as a warning against underestimating the influence of Greek thinking on the development of law.

[34] *Revue Historique de Droit Français et Etranger*, XXXII (1954), 488f.

[35] *Laws*, IX, 865 B.

[36] *Laws*, XI, 914 E.

[37] *Laws*, IX, 862 B.

Plato influenced St. Paul too, or at least, so Ackermann and others have supposed. At all events, respect and admire as we may the great Apostle to the Gentiles, we have not to take literally his warning: "Beware lest one capture you by philosophy and empty speech, which men have learned to use, according to the principles of the world and not of Christ." [38] Philosophy is here, and rhetoric, and an ardent search for the scientific principles (the στοιχεῖα) of the world in which we live. These were the doings of the Greeks, eager to understand and put in order our complex and chaotic world for the good life of men. This was the influence of Rhetoric upon Law. Was Roman law after all, with minor exception, Roman in form but Greek in spirit, and was that spirit rhetoric? Was Vergil right, after all, not to list this among the arts of Rome?

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[38] *Colossians*, II, 8.

HISTORICAL MATERIALISM AND PSYCHOLOGISM *

THE name "historical materialism", introduced by Engels to describe the doctrine which, in the study of social phenomenology, attributes a preponderant value to economic relations, has been declared inexact by some of the best known commentators (Croce and Mondolfo, for example) with regard to the original meaning of this doctrine. The term should not be confused with those expressions that are typical of true and genuine materialism.[1] It has also been observed that that formula could just as well be applied to other conceptions—the sociology of Spencer, for instance, which is derived from biological principles.

It cannot, however, be denied that the prominence given by the principal exponents of the doctrine, Karl Marx and Friedrich Engels, to the "*material* productive forces" as determining elements in the structure of human society—and thus of life itself and of thought in its various manifestations —approximates this thesis to the conceptions of those philosophers who deny the priority of ideas, looking on them as derivations of matter, or, even, as "secretions of the brain." Therefore, it does not seem necessary to reject the name given by Engels; and the name has since then entered common usage to such a degree that it would anyway be difficult to replace it.

* This paper, first presented at the International Congress of Philosophy (Rome, 15-20 November, 1946), was published in the review *Scienza Nuova,* No. 2, 1955. It is here published again, with some additions.

[1] According to Croce, for instance, "historical materialism has no intrinsic relation to metaphysical materialism; it is a mere manner of speech" (*Materialismo storico ed Economia marxistica,* Milan, 1900, p. 17). Mondolfo, who has devoted extensive studies to this subject (*Il materialismo storico in Federico Engels,* Genoa, 1912; *Sulle orme di Marx,* 3rd ed., Bologna, 1923-1924; see also his article, "Materialismo storico," in *Enciclopedia Italiana*), states that Marx and Engels not only did not adhere to metaphysical materialism but "critically destroyed it."

A more fitting name, without doubt, is that of "economic determinism," although this too has been attacked by some authors, but for no sufficient reason. It is quite true that Marx often talks of "what men do," and admits explicitly that society is "made by men," thus furnishing an obvious comparison with Vico's famous doctrine. But the agreement is only apparent; for what matters is the conception of *how* men act: whether they are dominated and constrained by the material necessities of existence, or whether they are guided by the immanent final cause that is inside them, and whose transcendent principle can be identified with Providence. The two conceptions are so radically different that it would be difficult to imagine a greater contrast. The so-called "dialectic materialism," supported by some people with reference to those statements by Marx, leaves the fundamental thesis untouched, and does not correct, therefore, their radical faultiness.

We do not wish to analyze Marx's thought here in all its particulars, nor to trace its varying undulations of expression. In the works of all thinkers, not excluding the greatest and the most representative, it is always possible to collect sayings which, considered separately, seem to lead to theories that are different and, in the end, contradictory to the main teachings of these same authors. Thus, for example, some writers like to uphold the moralism of Machiavelli, Kant's scepticism, or Leopardi's optimism, discussing their points of view in essays that are, more or less, ingenious, but which have not contributed, in general, to the cause of truth.

The substantial nucleus of Marx's teaching is formed by the preliminary remarks of his *Kritik der politischen Oekonomie*, which it is well to remember here, even if they are generally known:

> "In the social production which men carry on, they enter into definite relations that are indispensable and independent of their will; these relations of production correspond to a definite stage of development of their material productive powers. The

> sum total of these relations of production constitutes the economic structure of society—the real foundation, on which rise legal and political superstructures and to which correspond definite forms of social consciousness. The mode of production in material life determines the general character of the social, political and spiritual processes of life. It is not the consciousness of men that determines their existence, but, on the contrary, their social existence determines their consciousness." [2]

The interpretation of this passage does not seem to leave room for ambiguity—so that it is perhaps a case for applying the maxim: " where the letter is clear, do not make an obscure gloss." These statements, moreover, are in agreement with those found in Engels' various writings, which are no less explicit. And if we wish for still clearer proof, we only have to turn our attention to the support given by the many writers who defend and disseminate this same teaching. Loria, for instance (to give a single example), expresses himself thus: " The economic fact is endowed with characters that ascribe to it an evident pre-eminence in the ordering of human society." [3] " The economic fact is simpler than all other social phenomena, and precedes them chronologically." It is, in a word, " the basis of social order." [4] Thus, to quote again the same author,

> " the secret of the connections between laws that are in force in every age should be sought, not in the supernatural principles, by which the old philosophy of law is nourished, but in the prosaic and material structure of economic life. In other words, it is political economy that forms the philosophy of law." [5]

[2] Marx, *Zur Kritik der politischen Oekonomie*, Vorwort (in the 2nd edition by Kautsky, Stuttgart, 1903, p. xi).

[3] A. Loria, *La Sociologia—Il suo compito, le sue scuole, i suoi recenti progressi* (Verona, 1900), p. 118.

[4] *Ibid.*, pp. 119 ff.

[5] *Ibid.*, p. 128. This corresponds precisely to the conclusion which Marx states to have reached after his critical examination of the *Rechtsphilosophie*

These are clear-cut declarations and certainly not ambiguous, and render further quotations superfluous.

Let it be said at once that this conception is, to our way of thinking, fundamentally mistaken. But this does not mean that, like all errors, it does not have a particle of truth—as will appear shortly.

Material elements enter into economic relations only inasmuch as they correspond to the needs, inclinations or aspirations of human beings, thus constituting a way or a means of their possible satisfaction. They are not, however, the cause of these needs or aspirations. They do not determine their rise, but only the manner in which they are satisfied—and this is always a *consecutivum* in regard to the primordial psychological fact. Agriculture can certainly not exist in districts where the soil is absolutely sterile, nor can industry develop where coal mines or sources of electric energy are lacking—just as there can be no hunting where game is lacking. But the presence of elements of the physical order is not enough, of itself, to explain the initial stages of any particular activity, whose roots must always lie in a given *state of mind* of the subject—even if it exists in the obscure and pre-rational form of instinctive behavior or of subconscious memories. It is clear, for example, that the need for food, which is proper to every human being, and which drives mothers and fathers to provide, not only for themselves, but also for their own offspring, can be satisfied in various ways, depending on what the surroundings have to offer. Thus, the kinds of activity aimed at satisfying such a need will vary, precisely because the conditions of the outside world are different. But only in a partial and improper sense can such activities be said to be determined by these conditions, and to have their cause in them. The most that can be admitted

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by Hegel: "juridical relations and political forms cannot be explained either by themselves or by the so-called general development of human spirit, but take root, on the contrary, in the material relations of life" (*Zur Kritik* etc., p. x).

is that such conditions are secondary causes—but the prime, and really determining, causes are inherent in the very being of the subject, that is to say: they are the motives of his action.

In other words—as I have remarked elsewhere [6]—the logical error of the exponents of historical materialism or of economic determinism consists in confusing the condition with the cause; or, if one prefers to say, in confusing the necessary with the sufficient conditions, so that a certain relation to life arises and takes concrete form in a specific way. If proof for this were needed, it would be enough to bear the fact in mind that the same elements (for instance, the existence of sea coasts, of mineral deposits, etc.) are far from producing the same effects among different peoples and at various times. Many other factors, of quite another order, play their part in determining the direction and the kinds of activity undertaken by individuals as well as by peoples.

These considerations are, doubtless, obvious enough; but it is precisely the elementary truths that are denied or obscured by those who construct artificial and one-sided theories, which sometimes appear attractive, and are followed, just because of their one-sidedness.

The activity that is directed to acquisition, to production, and to the exchange of material goods—in a word, economic activity—is, clearly, but one part of the vast and complex field of human activity, which sets itself numerous other aims besides these. In reality, all the phenomena of the practical order are linked together; so that it would neither be possible to reduce all human actions to a single economic category nor, with a clean cut, to separate the various kinds of action. "History and facts," wrote Igino Petrone in his penetrating criticism of Antonio Labriola's [7] well-known essay, "account

[6] See *Lezioni di Filosofia del diritto* (9th ed., Milan, 1953), p. 329. (English ed., *Philosophy of Law*, trans. T. O. Martin [Washington, 1953], p. 412.)

[7] Labriola, *Del materialismo storico: Dilucidazione preliminare* (Rome, 1896).

for the reciprocity, the correspondence and the interdependence of economic phenomena and of other historical phenomena: none of these account for the dialectical causality of any for the others, nor the dependence of the latter from the former as a derivatory source." [8] We may go still further and say that an economic phenomenon is never *only* an economic phenomenon: at the same time, in so far as it proceeds from human will, it is a moral and legal act, in the sense that it can be valued, and is valued, by the measure of morality and of justice.[9] We do not deny that scientific analysis can isolate, or attempt to isolate, by an abstract procedure, the economic criterion or that of pure material utility from the other criteria that effectively control the course of human actions in their historical and social reality. But we do deny that all actions obey this one criterion, and that there is a single action that does not, at the same time, enter other categories. With reference to this problem, the admission made by many of the most intelligent exponents of historical materialism—or of economic determinism—is significant. The admission they make is that, in this very phenomenon, economics would represent the content, and law the form. It cannot be denied that certain facts (exchange, ownership, etc.) are studied equally, under different aspects, by lawyers and economists alike. But this admission does not suffice: primarily because the form they speak of is not (as these authors seem to mean) an extrinsic element, a mere accessory and accidental happening, but an intrinsic factor that is an essential part of historical and social reality. Moreover it should be realized that law does not always include an economic content in its various forms; many of its most important institutions (such as the

[8] Petrone, "Un nuovo saggio sulla concezione materialistica della storia," *Rivista internazionale di scienze sociali e discipline ausiliari*, XI, (1896), 556 (reprinted in the volume, *Filosofia del diritto con l'aggiunta di vari saggi* [Milan, 1950], 183).

[9] Del Vecchio, *Diritto ed economia* (first published in *Rivista internazionale di Filosofia del diritto*, XV [1935], fasc. 6; new ed., Rome, 1954) pp. 38 ff.

essential rights of the person—the right of religious liberty, of suffrage etc.) do not even have any such content at all.

Only within fairly restricted limits, which proceed from the foregoing considerations, can it be conceded that the materialistic conception of history can offer any contribution to the investigation of the elements that form reality. But one should, without doubt, reject the principal thesis, which attributes a chronological precedence and a causal value to the economic phenomenon in its relation to other phenomena. This is what Loria, for instance, maintained, faithfully following Marx's footsteps:

> "Man must, above all, procure for himself the necessary means of livelihood, and only when these have enabled him to stand on his own feet, can he think of promulgating laws, creating moral sanctions, etc. In other words, the economic fact takes precedence over all other phenomena of human society." [10]

Statements of this kind are founded on the mistaken belief, which is often encountered amongst those who have no legal training, that Law consists essentially of a system of written laws that have been formally promulgated, or, rather, of enactments that have a penal content. The following episode may serve as an example. A friend of mine, who had returned to Italy after a three years' stay in a country of central Asia, told me that Law did not exist there. When I asked him if there was not some kind of familiar organization there, and if they did not make contracts and exchanges there, he admitted that they did; and he ended by withdrawing his first opinion.

It is strange that, more than two centuries after Vico, after the historical school of jurisprudence, and after innumerable other proofs furnished by ethnologists, jurists, and philosophers, we still have to insist upon such elementary concepts, which should, by now, be the common patrimony at least of educated people. Justice is not born as laws but as custom;

[10] Loria, *La Sociologia,* pp. 119-120.

and such custom is, like language, a primary and spontaneous product of the human spirit, preceding all reflection and elaboration, which only occurs much later and formulates abstract rules, already alive and at work in the public conscience. Only a person who denies or ignores this can write fables about a primitive "economic arrangement" of society unaccompanied by a corresponding legal arrangement and not determined by it.

Nor should we talk differently about morality, for, like justice, it has its own natural and spontaneous roots in individual conscience, whence it is reflected and expanded into social conscience. Since it expresses itself in custom, the two determinants of action, justice and morality, appear at their origin almost entirely fused together, and they remain connected and in relation to each other, even after philosophical analysis and technical elaboration have come to divide them.

Man cannot affirm his own personality without acknowledging that of other persons—whence a limitation is imposed on his will-power. Law does not consist essentially in anything but this. Man, also, cannot act without making some kind of choice between the actions that are possible for him, a choice that presupposes a criterion, and thus a distinction, between good and evil: and this is what the framework of morality consists of. Apart from love of self, the recognition and the love of other human beings intervenes here as a fundamental motive, starting with those who are closest to the individual, the nearest members of his family.

However slow and difficult the exact demonstration of these concepts is made through the action of the *raison raisonnante*, all the more certain, alive, and immediate is their presence in even the most primitive human spirit, where they form true and genuine categories, already operating, of necessity, even in the phases of unconscious and instinctual behavior. And it should be noted that analogous manifestations, although inferior in grade, which can be called pre-juridical and pre-moral, are also found in animals, or at least in some species of

them. These manifestations are, as it were, an embryonic symptom, a tenuous glimmer of that same spirituality which emerges to shine upon human nature as its inherent and unfailing characteristic.

The problem which historical materialism—or economic determinism—imagines it is solving with its simplified formula is, then, really rather complex. Just as knowledge is not only an objective fact, but a relation between a subject and an object, so actions are never determined *sic et simpliciter* by the conditions of the external world, although they necessarily unfold in relation to it.

The *primum movens* of action lies in the nature of subjective being; from this proceed those determining factors and inclinations which find the material for fulfilling and externalizing themselves in the surrounding elements of physical nature. But it is not possible to reduce all of a person's activities to this material; neither is it possible, even if we take all the primitive phases of human activity into consideration, to look upon it as directed exclusively towards the satisfaction of the material needs of life.

The truth is that human nature is compounded of infinitely diverse tendencies and attitudes, which it is difficult to reduce to one scheme. If we wish, nevertheless, to count them and to classify them, we should not imagine them as really separated and arranged in series, as if they succeeded each other as parts of a mechanical process. We should, on the contrary, conceive them as springing, organically, from one identical root, the human spirit, and as being in existence, at least embryonically, ever since subjective being first came to life.

No one is unaware of the fact that, after the first crude formulations of the materialistic doctrine of history, there was no lack of attempts to refine it, thus warding off the objections raised against it. Whilst always upholding the fundamental thesis that the economic structure of society is the underlying cause of every other phenomenon and of all

ideologies (including morality, justice, and religion), some writers, especially Labriola, sought to distinguish between a primary series of derivations, which are immediate and direct —such as, for example, the forming and the frictions of the various social classes and the development of the definite domination of one class over another; and a secondary series of derivations, which are mediate and indirect—such as the tendencies and manifestations of thought in the production of art, religion, and science. The origin of these secondary products (we are told) has been partly forgotten; and for this reason we are under the illusion that they are independent and autonomous.

We do not wish to deny that such attempts are ingenious; [11] but even if we consider the more recent investigations which have been made in order to pursue and test those attempts in different fields, we must re-affirm that such theories are insufficient and irreparably wrong. Not only do our general objections remain intact, even when faced with this more refined form of the materialistic doctrine of history; but other more specific objections can be added as regards the facts it alleges. For, experience shows us that all the "ideologies" which are denounced by this doctrine as being late and contingent superstructures or epiphenomena, do not follow, but accompany—when they do not indeed precede it—the formation of "economic relations" from primitive times onwards. We can see moral behavior in action, displaying typical and sublime forms of altruism (such as the relation between parents and offspring), already at the very beginning of all forms of human life; in fact, human life would not be possible without it. Similarly, justice, as an affirmation of the limits imposed on what is lawful in personal relations, makes its appearance *ab initio;* the institution of lawful self-defence, for instance, certainly did not wait for any legal codes or clauses to be sanctioned by usage and by human conscience (it is not

[11] This has been recognized, perhaps with excessive indulgence, by Petrone in his criticism of Labriola's work (*op. cit.* n. 8 *supra,* pp. 554 f. [181 f]).

by chance that the Romans invoked the *naturalis ratio* to justify the principle, *vim vi repellere licet*). As far as religion is concerned, it is simply puerile to believe that it is an invention springing from an advanced phase of culture. There is not a human being, or a people, however savage, which does not, in its own way, fear and adore the invisible forces around it, and does not seek to propitiate them, even if with superstitious rites; no one is insensible to the mystery of death, of the land beyond the grave. Nor is it true that aesthetic and artistic activity appear only at a late stage, as an indirect effect of material necessity; for it has been proved—however extraordinary it may sound—that the clothing used by primitive men took rise from the desire for beauty, which precedes even the need for protection against bad weather.[12]

Need it be said, then, that science, in the wider meaning of the word, is inseparable from spirit, which can, indeed, err, but which must somehow aspire to the knowledge of the truth? And who could deny that, even in the uncilivized savage, some knowledge of this kind is to be found? If this were not the case, when and how should science suddenly begin? And how could science spring from previous economic relations, if these relations clearly pre-suppose certain ideas, even if their form is rudimentary?

Philosophy—if this word is used to designate a systematic treatment of first principles, *more scholastico*—no one will expect to find among uncivilized peoples; and even among civilized ones, it still appears as an exceptional phenomenon, reserved, so to speak, to a handful of thinkers. But if, in a broader and truer sense, we mean by the word "philosophy"

[12] This was already remarked by Cattaneo: "It would seem, at first, that the attention of barbarians should limit itself to the search for things necessary to animal life. But man, even in his most wild condition, feels the need, first to adorn himself and then to dress himself; travellers describe him naked, but painted with various colors and adorned with feathers and necklaces: *animal gloriosum*. Since the very beginning of nations, intelligence addresses itself to moral needs . . ." (*Del pensiero come principio d'economia publica*, in *Opere*, V [Florence, 1881], 371). Recent inquiries have fully confirmed this as well as the other remarks made above.

an orientation of the soul according to certain directive lines, both in theory and in practice, then we can venture to say that every man, merely because he thinks and acts, is in some way a philosopher: it is impossible for him not to pursue an orientation of this kind for his life, viz., to follow a certain logic and a certain morality. And are not logic and morality essential and constituent parts of philosophy, even in the strict sense of the word? Here, if we look closely, we are dealing with grades, or transitions, leading from dim and almost instinctive forms to those that are more conscious and more rational. Long and arduous is the road that leads from the lowest grades to higher ones, but it is wrong to disregard the nature of the evolutionary process in which philosophy develops—that is, the unfolding of a seed—merely because its beginnings are remote from its final stage.[13]

This summary sketch, which calls for further development and for more particularized proofs, is designed to point only to the methodological exigency which, in the scientific and philosophical study of historical reality, attaches fundamental importance not to the material that is given us by the external world, but to the human spirit in its diverse and active unity. This thesis is in opposition to the teaching of historical materialism—or economic determinism—and we can briefly call it "historical psychologism."

This thesis, to be sure, does not deny the importance of the data provided by physical nature. Such data should always be carefully considered, for without them the activity of the spirit would be void, if that were possible. But it must be remembered that the laws of human action as well as the laws governing the succession of historical events can never be derived from these data. Historical events are, from the phenomenalistic aspect, inter-connected, but always carry an

[13] The common saying, *primum vivere deinde philosophari*, should it contain a certain truth, must not be understood, as Loria erroneously does (*op. cit.*, n. 3 *supra*, p. 119), as a proof that spiritual activities can start only after the satisfaction of the material needs of life, that is, in a historical phase next to the "economical" one.

element of creativity, and thus of indeterminism, since they proceed from that autonomous source which is the spirit. It can be stated, in confirmation of this, that all the alleged proofs and cutting assertions quoted by the exponents of the determinist doctrine have never led (as they should have done, if it had any true foundations) to any scientific prevision of future events; and if such a forecast has been made, it has usually been flatly contradicted by the actual facts.

But we, on our part, should guard against committing an error analogous to the one committed by the doctrine that has here been disproved. This is the error of falling into a kind of "psychological dogmatism," which attributes to the human spirit one sole motive, or few motives, fixed arbitrarily without a proper examination of reality.

A well-known example of this is furnished by the attempts made in ancient and modern times to reduce all phenomena of human life to the single psychological motive of self-love (egotism); attempts that have all failed in that they have left many facts unexplained which are no less sure than those on which these attempts are based. With the instinct of self-preservation (*conatus proprium esse conservandi*) there is associated the no less commanding urge to preserve one's own species. The love of self alternates, and intertwines, with the love of others; so much so, that it would be equally possible, and equally one-sided, to base all the theories of human life on the sole motive of sociability. Any of these motives can ultimately be transformed into actions that are so diverse and so different in value that they constitute, now extreme vice, now supreme virtue.

But these motives do not stand alone. For, other aspirations of the soul are joined to them, springing directly from its spiritual essence, not as a *consecutivum,* but as something simultaneous and concomitant: the tendency towards the universal, as it is expressed in the forms of truth, goodness, justice and beauty. The activity directed towards these ideals (activity that may be scientific, philosophical, religious, moral,

legal, aesthetic) has no physical limit, nor is it tied to any particular object of the empirical world; its very nature is, rather, infinite, so that its function in the life of the individual resolves itself into a lasting desire to strive for a goal which transcends it.

Such being reality, how would it be possible to assemble the motive forces of human vicissitudes within a single framework, and to mark their courses and laws, such as they are formulated, for example, in mechanics? It is indeed strange that so great a genius as Giambattista Vico took the risk of making this desperate attempt, with his all too famous theory of *corsi e ricorsi* (viz., of the recurrence of historical facts); I say, too famous, because this is the least happy and least true part of his system, and yet it is the only part that most cultivated persons feel obliged to know (which proves that philosophers are made famous in public opinion, not by the truth in their teaching, but by the errors). This is all the more strange in Vico's case, because he understood, better than anyone else, that it is the human mind which gives birth to the whole of history, namely, to " the world of the nations " —the human mind, which, of its very nature, participates virtually in the infinite.

But we, while holding firmly to this principle, realize the necessity of finding in a broader and deeper psychological analysis the best possible light to illuminate the succession of human events, without having recourse to any mechanical schematism or to any dogmatic preconceptions. The dogmatism that must be avoided can consist just as much in that " historical systematism " of metaphysical origin with which Carlo Cantoni reproached Vico's teaching (and not without reason)[14] as in the opposite prejudice, represented by the doctrine of historical materialism.

[14] V. Cantoni, *G. B. Vico—Studii critici e comparativi* (Turin, 1867), pp. 229 ff. See Del Vecchio, *I presupposti filosofici della nozione del diritto* (Bologna, 1905), pp. 50 ff.

It is indeed difficult, in this connection, to keep to the critic's "highway," which is equally far from scepticism as it is from dogmatism. In examining the motives for action, in individuals as well as in peoples, we must proceed with the greatest objectivity, although we are dealing with subjective phenomena; it is necessary to *intelligere* (in the sense expounded by Spinoza) before undertaking to evaluate. It is not enough to understand the original intention that had led individuals or peoples to give a certain course to their actions; for often just a slight deviation or exaggeration in carrying out these intentions is enough to change their whole meaning, thus causing quite incongruous effects. We may think, for example, of all the possible consequences that can derive from patriotism, so different according to the intentions behind it and according to the limits within which it may, or may not, be kept. The same can be said of all other motives.

Analysis should, then (to put it briefly), work in depth, gathering from the innermost sources of history the psychological elements—even those hidden from sight—which take part in the genesis, the deliberation, and the execution of human actions. Nor should our investigation stop here; for the very nature of this material requires that scientific investigation, viz., the analysis of motives, should be followed by (while remaining distinct from) an ethical appreciation of these motives and of the actions that correspond to them. Precisely because we do not believe that historical events should be considered as necessary and fatal consequences of given circumstances, do we feel that it is the concern of the philosophy of history to evaluate men ethically, especially those who have played, or who now play, an important part in determining their people's destiny. Fatalism and determinism ought to be particularly opposed here, because they are not merely theoretical errors, but are factors in the debasement and moral perversion of men, in so far as they induce them to give free rein to their impulses, under the deceiving appearance and the facile pretext of historical necessity, ex-

onerating them from the absolute obligation of answering for their deeds.

There is, indeed, a "world tribunal," which is not the same as world history—as a famous and equivocal saying would suggest. *Weltgeschichte* as *Weltgericht*—this word leads to a supine adoration of the *fait accompli* and the idolatrous worship of power. It is the human conscience that is the world tribunal; and this conscience is not vaguely content with facts merely because they are historically determined or imposed by some preponderant power. The victories gained by such power, forcing its subjects to obedience, are never, of themselves, a final verdict; for the human conscience is endowed with the unquenchable faculty of discerning, beyond the mere fact, the idea, and beyond dark force the eternal light of justice. Such a judgment makes itself felt even after generations or centuries, thanks to the common spiritual nature which binds all men to one another with a sacred and indissoluble chain (*religio*) that carries them beyond their own life on earth. No power on earth can escape this judgment, which, if it is honestly and nobly inspired, bears the imprint of the absolute.

The highest expression of conscience is philosophy, whose various branches include, as an explanatory and critical synthesis of human action, the philosophy of history. This branch of philosophy has recently been much neglected, and sometimes, even, opposed and repudiated. I do not feel we are wrong in attributing this to the prejudices pointed out in this article. May a true and great philosophy of history arise, founded on the priority and the freedom of the spirit.

Giorgio Del Vecchio

Rome

THE FIRST PROVINCIAL COUNCIL OF MANILA, 1771 *

THE recent discovery of a unique manuscript copy of the acts of the first Provincial Council of Manila in 1771 presents an opportunity to consider aspects of the study of Church history for Latin Americanists in the United States; to review in summary fashion the history of ecclesiastical councils in the Spanish empire; and to illustrate the use of ecclesiastical materials for the historian by examining in some detail the history and legislation of the Manila council.[1]

I

While pursuing materials properly to set the contemporary stage for the Council of Manila, the dearth of solid monographs and syntheses for the history of the Church in the New World became patent. The pages of the *Hispanic American Historical Review*—a logical starting point for Latin American studies in the United States—from its inception contain less than a dozen articles discussing any aspect of the Church that is in the warp and woof of Spanish, Latin American colonial, and modern history. Cries of alarm and carping criticism can

* One of a series of studies dedicated by his friends and former students to Ernst H. Kantorowicz, Professor of Medieval History, Institute for Advanced Studies, Princeton.

[1] The Library of Congress, Manuscripts Division, *Philippine Islands, Accession No. 6106-A, Box 1.* The MS, in Latin, was acquired from a dealer in 1939, with a lot of colonial materials from Cagayan, and was reported in the *Annual Report of the Librarian of Congress for the Fiscal Year Ending June 30, 1940* (G. P. O., Washington, 1941) 105. The MS, on water-marked paper, contains 44 folios or 88 pages with incorrect pagination. A small part of the text, written in a poor hand, is repeated in a good one. Generally quite legible, the script has the peculiarities of the period; the spelling is erratic with mistakes of a Spaniard, who, while pronouncing Latin *hispanicè*, proceeded to spell it phonetically. In places the paper is badly worn and flaked and has many worm-holes throughout. The dealer kindly informed the writer that the MS was probably bought in Spain.

in no wise fill this lacuna, but some reflexion on the matter may suggest ways to diminish it and even to attract future students to this field.

What are the causes for the neglected study of this institution which, positively or negatively, has touched and still touches every single phase of the political, economic, cultural, and moral life of the Spanish empire and its descendants? [2] Two major causes are to be sought in the history of American universities and in trends in historiography in the United States. A third cause, more psychological and national than cultural, is an American attitude which confounds the study of doctrines and institutions with belief in, or subscription to, the doctrines and institutions themselves.

When graduate training developed in the universities east of the Mississippi in the 1880's, the discipline of Church history had been isolated already fifty years in the theological faculty—usually a seminary—and the subject was not readily accessible to the lay students of history. Only at Harvard, it appears, were there courses in Church history open to the general student body.[3] The substitute for church history, medieval history, was believed to embrace all that was needed for a general knowledge of the Church and its peculiar institutions. But many great teachers in the medieval field long had a penchant for English medieval and constitutional

[2] Aspects of the general problem have been treated by Clifton B. Kroeber, "La Tradición de la historia Latino-americana en los Estados Unidos: Apreciación Preliminar," *Revista de Historia de America,* No. 35-36 (1953), 21-58, with generous bibliography; for Church history, p. 41 note 33, and pp. 43-44; L. B. Simpson, "Thirty Years of the HAHR," *Hispanic American Historical Review,* XXIX (1949), 188-204, where Church history is not specifically mentioned; H. F. Cline, "Reflections on Traditionalism in the Historiogrpahy of Hispanic America," *ibidem,* 205-212, especially p. 207, where the writer signalizes the lack of attention to intellectual history and the history of ideas.

[3] The Winn Chair of Ecclesiastical History was founded in 1882—in the words of Ephraim Emerton, the first incumbent—"in the hope that the history of the Christian Church treated as a part of the general history of mankind might be profitable to other than divinity students." *Church History,* IV (1935), 147.

problems with a result that whatever Church history seeped into the courses was only sufficient to prepare the student to understand the writs of praemunire and the separation of the English Church from the Roman See. In the United States, then, to the first World War, rarely have Latin American historians had a ready opportunity to acquire a rounded view of the history of the Church; nor has the situation greatly altered.

The second cause, American historiographical trends, is too well known and needs only to be indicated. From the period of the first World War, interest in history seized strongly upon political and economic history with a considerable emphasis on diplomatic history and international relations. Where an interest was evinced in ecclesiastical matters, it flowered usually in a Church-and-State study for a country or area during the nineteenth or early twentieth century.[4]

The third cause stems directly from confused attitudes in the United States towards matters of Church and State. The great, State-supported universities seem charter-bound to offer no courses on religion; which means no lectures or seminars devoted to the history of the Church are to be given. This in spite of the fact, which has nothing to do with belief or unbelief, that the Church is that unique institution which began in the reign of Augustus and developed continuously to face the conditions of the decline of classical antiquity; was the greatest innovator and leader of the Middle Ages; survived the major social upheaval of the Renaissance-Reformation age; participated in the epoch of expansion and absolutism; weathered the revolutionary period of the western world; reconstructed its mission to spread over the globe in the industrial climate of the nineteenth and twentieth centuries,

[4] See Kroeber [note 2]; Charles E. Nowell, "Has the Past a Place in History?" *Journal of Modern History*, XXIV (1952), 331-340, ably discusses the malaise of modernity; Simpson's [note 2] statistical analysis of articles in *HAHR* shows 28% under Diplomatic history and a total of 35% for Economic, Social and Institutional history.

and does not abate its activities in the midst of today's anxieties. At present the study of Church history has no place in our state universities, but occasionally an introduction to some of its history and institutions is bootlegged into lectures on political theory, sociology, and the history of religions. Ironically, the rites of voodooism and its psychology can be investigated openly with tax support, while the study of the principal conservator of western culture and intellectual discipline can be pursued only modestly in private institutions, or parcelled out in public universities. However many the causes for this lack of instruction, even the most positivistic and pragmatic Latin Americanist must face the *fact* that he cannot write significantly any important phase of Latin American history without marking out the place of the Church in that epoch; nor can the biographer essay to evaluate his subject without counting in the attitudes and values derivable only from the contemporary Church. To even the balance weighted too heavily for a generation in favor of some social sciences, the addition of Church history to the general historical curriculum is worthy of more than a little consideration, particularly for the apprentice in Latin American history.

II

Ecclesiastical councils play an important role in the history of the Spanish empire. A fact often overlooked is the impact of the General Council of Trent (1545-1563) on both the Spanish and colonial Church. The temper of Catholicism, sharpened and placed on the defensive by the ecclesiastical revolt and separations, was altered during the Council. The discipline of the Spanish Church, which had developed over more than a thousand years many practices and forms peculiar to Spanish needs, was re-examined immediately after the General Council in a series of provincial councils to bring that older discipline into conformity with new standards legislated

at Trent and approved by the Holy See.[5] As new requirements and standards emanated from Rome and from the internal legislation of the Spanish Church, they were transmitted to the New World; not directly, but through the *Consejo* of the Indies,[6] a considerable part of whose labors was occupied with the ecclesiastical matters deriving from the papal concessions embodied in the Real Patronato.[7] It is precisely in this very region of interpreting the rights of the Crown and the rights of the Church that centered the never-ending strife between king and pope, between viceroy and prelates, between regulars and *cabildo*, between regulars and seculars, and between orders.[8] This constant strife, sympto-

[5] Between 1565-1566, provincial councils were held in the ecclesiastical provinces of Toledo, Granada, Zaragoza, Braga, Compostela, and Ebro; again in the 1580's, others were held at Toledo, Burgos, and Tarragona; cf. Iosephus Saenz de Aguirre, *Notitia Conciliorum Hispaniae atque Novi Orbis etc.* (Salmanticae, 1688) 432 f.; Juan Tejada y Ramiro, *Colección de Cánones y de Todos Concilios de la Iglesia Española* (6 vols., Madrid, 1855). Vol. V gives the texts of the Spanish and New World councils for the sixteenth century; Vol. IV the documents important for the Council of Trent, and for the Spanish relations with that Council. Vol. VI, a bibliographical rarity, does not seem to be included in any set available in American libraries.

[6] Roberto Levillier, *Organización de la Iglesia y Ordenes Religiosas en el Virreinato del Perú en siglo XVI* (Madrid, 1919), Part I is a *cedulario* and Part II, a *bulario*; Jesús García Gutierrez, *Bulario de la Iglesia Mexicana* (Mexico, 1951), reviewed by A. Millares Carlo in *Revista de Hist. de Amer.*, No. 35-36 (1953), 240-241, where the older *bularios* of Hernáez and Tovar are cited.

[7] On the ecclesiastical work of the Consejo, see Ernesto Schäfer's magistral work, *El Consejo Real y Supremo de Las Indias* (Sevilla, 1947), II, 191-248.

[8] For the strained relations between Philip II and Pius IV, see Ludwig Pastor, *History of the Popes*, XVI (London, 1928), ch. 10. A curious example of the refinement achieved in the controversy is to be seen in the Mexican Inquisition records, under the date March 20, 1574, when the Inquisition ruled on the Dedicatory Letter of *Bocabulario de la Lengua Mexicana en lengua castellana* by Fray Alonso de Molina, a Franciscan, where the phrase occurred, "... Hablando con el Visorrey entre los quales [el] Excel^te. principe eligio y constituyo a Vra. Ex^a.—Por supremo y cabeça de esta Yglesia de la Nueue espana ...". The Inquisition ordered the words *de esta Yglesia* stricken out as highly improper. LC Mss. Div., Conway Collection, *Libro Primero de Votos*, p. 73. I owe the reference to the kindness of Dr. J. J. Finan, Jr., former Hispanic Specialist of the Manuscripts Division.

matic more often than not of little-concealed power struggles, needs to be understood to interpret the life and institutions as they were constantly changing in the Spanish Indies. As there had been held in the Peninsula many provincial councils to introduce the reforms of Trent, so in the New World, the archbishops of Lima and Mexico convoked councils in their own provinces, not only to implement the legislation of the General Council, but also to reach decisions on local matters. In the colonial period the archbishops of Lima held six councils: 1551, 1567-1568, 1582-1583, 1591, 1601, 1772: Mexico held a *Junta Apostólica* in 1524-1525, but only four councils: 1555, 1565, 1585, and 1771.[9] It becomes apparent at a glance when we recall the dates of the Spanish provincial councils, that the ecclesiastical assemblies for the Spanish empire follow a chronological pattern for the sixteenth century. In passing, it should be noted that when the Third Council of Mexico was convoked, the archbishop, Pedro Moya de Contreras, invited his suffragan from the newly established diocese of Manila to attend. Owing to the great distance, Fray Domingo de Salazar, O.P. excused himself. ". . . y dió su Poder á dos Canonigos de esta Santa Iglesia de México . . .".[10] Thus, legally Manila was early present in a colonial provincial council.

One hundred and seventy years passed before another Provincial Council was convoked in the New World. In the

[9] For Lima, there are critically edited texts for all the councils in Ruben Vargas Ugarte, S.J., *Concilios Limenses* (1551-1772), 3 vols. (Lima, 1951-1954). For Mexico, the best texts for the Councils I-III are in *Concilios Provinciales Primero y Segundo de Mexico en los años de 1555 y 1565* (De Hogal, Mexico City, 1769), edited with an *Introduction* [not paginated] and the III Council by Archbishop Francisco Antonio Lorenzana Tejada y Ramiro [note 4] follows an incorrect Paris edition mentioned by Lorenzana, but not seen by me. For the IV Council, we have *Concilio Provincial Mexicano* IV (Querétaro, 1898), printed at the order of Dr. Rafael Sabás Camacho, third bishop of Querétaro. The volume contains also *Apuntamientos bibliográficos sobre el Concilio Mexicano IV* by Dr. Nicholas León, who discusses the known manuscripts of the council; the printed text was made from a single MS in the private collection of the bishop.

[10] Lorenzana [note 9], paragraph 14 of *Introduction*.

intervening period profound changes had occurred in the material and political standings of nations. New intellectual currents were shaping a society and a new élite; the temper of the times, critical of current institutions, advocated more state control for religious and educational reforms and less state control for individuals. Two large trends can be accepted as legitimate generalizations: the publicists generally advocated more prerogative for the monarch; and they insisted on greater secularization in all institutions. In Spain, this amounted to a change from the Caesaropapism that marked Philip II's attitude. The Bourbons, all over Europe, were ever-zealous guardians of orthodoxy, but only as long as they determined the ways and means. The second half of the eighteenth century witnessed a low point in the power of the Papacy in the face of the rising tide of enlightened despotism and secularism. The reactions against the Roman curia and the attacks upon the Church are known under various names: regalism in France, Febronianism in the Germanies, and Josephism in the Holy Roman empire; but whatever the specific form, the inner unity rested upon the enlightened despotism and the secularism of the *Aufklärung*.[11]

III

The complex and incomplete story of the first Provincial Council of Manila can only be summarized at this time. What follows must necessarily be corrected, but the history of the Council can be used to illustrate the valuable historical and sociological material readily at hand for future study.

Carlos III of the House of Bourbon, a ruler of exemplary personal piety and orthodoxy, sought to have the ecclesiastical establishment reformed, but not without the guiding principles of the monarch. To this end, Carlos issued his *Cédula*

[11] Hans Erich Feine, *Kirchliche Rechtsgeschichte*, 2nd ed. (Weimar, 1954), 512-522 with extensive bibliography. For the concordats between the Bourbons and the Holy See, see the documents edited by Angelo Mercati, *Raccolta di Concordati su materie ecclesiastiche tra la Santa Sede e le Autorità Civili* (Roma, 1919, 2nd ed. 1954).

Real of August 21, 1769,[12] directed to the archbishops of the Indies and the Philippine Islands, and set forth twenty points which appeared to be worthy of the grave consideration of provincial councils. From a phrase contained in this royal decree, it has been remembered and referred to as the *Tomo Regio.*

The contents of this *Tomo Regio* appear simple, direct, and, within the system of the *Patronato Real,* quite logical. However, it evoked sharp criticism when issued, and strictures have continued to our own time. Judgment will largely depend on a general analysis and evaluation of the religious policy of Carlos III,[13] which would, however, exceed the limits of the present paper.

The decree emphasized the solicitude of the monarch for the well-being of the whole religious establishment; moreover, it stated his obligations with respect to the canons and his responsibility stemming from his royal patronage. He commanded that, without delay, provincial councils be convoked in the Indies and Philippines, ". . . para esterminar las doctrinas relajadas y nuevas . . ."; [14] to reform monastic discipline; and to bring under the jurisdiction of the bishops the regulars charged with the cure of souls. The specific requirement of the decree directs sending to each suffragan a copy of the *Tomo Regio* to the end that all members should have a clear idea of the several purposes of the council, and be prepared to decide upon the matters of special interest to the king.

Not all the royal interests are necessarily to be termed Masonic or secularistic. Insistence on such matters as the proper celebration of the liturgy; preaching and the correct

[12] Vargas Ugarte [note 9], II, 207-213.

[13] Mariano Cuevas, S.J., *Historia de la Iglesia en Mexico,* 5th ed. (Editorial Patria, Mexico, 1946), IV, 503-529; Juan Ferrando, *Historia de los PP. Dominicanos en las Filipinas, etc.* (Madrid, 1871), V, 97-133; Emma H. Blair and James A. Robertson, *The Philippine Islands* (Cleveland, 1907), L, 269-316.

[14] Vargas Ugarte, II, 207.

exposition of doctrine; the use of ecclesiastical courts and a cessation of certain abuses; a proper text of the Roman or Tridentine catechism; the re-division of parishes, and so forth, appears paternalistic but worthwhile. A social measure, suggested in the decree, was the provision which gave the right to Indian or mestizo clergy (to the proportion of a third to half) to reside in the seminaries—a measure which met with resistance as being contrary to past practice. But we are in the midst of *Aufklärung* policies when the *cédula* takes up the provisions that the houses, together with the lands and income, held by the expelled Society of Jesus, ought to be turned into diocesan seminaries with endowed chairs; and that the other buildings ought to be used for training men for the priesthood and for developing a sense of the *vita communis*—certainly a strange way for the Royal Council to implement the Tridentine legislation on diocesan seminaries. There was also the requirement that religious charged with the cure of souls must in all matters come under the jurisdiction of the local Ordinary (the bishop). And to all this was added the unlimited episcopal right of visitation of religious houses—a point of contention almost as old as monastic houses themselves, and on which the royal decree upset the balance carefully worked out in the reform of Trent.

After setting forth his twenty points, the king commanded that his *Tomo Regio* be inserted in the acts of the provincial councils, and as soon as the councils were terminated, the originals should be sent to His Majesty.

When the royal decree reached its several destinations in Lima, Mexico City, and distant Manila, the three metropolitans at once complied with its urgent request for action, and in the three provinces notice of convocation was despatched to the suffragans, the heads of orders, and to all lay dignitaries. The sixth Provincial Council of Lima, although convoked originally for the first of August 1771, actually did not open until January 13, 1772.[15] The fourth

[15] *Ibidem* II, 212-218.

Provincial Council of Mexico opened January 13,[16] and the acts were subscribed on October 26, 1771.[17]

The Archbishop of Manila, Basilio Sancho de Santa Justa y Rufina,[18] convoked his synod for May 19, 1771, the gathering to be known as the first Provincial Council of Manila. This brilliant and vigorous *Escolapio*[19] is presently little known and his reputation has apparently suffered from uncharitable attacks from those writers who were perfectly happy to continue the status quo of the Philippine Church which had suffered materially and spiritually from the English occupation (1762-1765).[20] Sancho's evangelical zeal stimulated his adversaries to attempt to denigrate his reputation by charging him, at both royal and pontifical courts, with heresy, Jansenism, and treason. Only when the history of the Philippine Church has been more carefully documented in the light of the religious and intellectual currents of the later eighteenth century, can the position of this reforming prelate be assessed.

Here, attention can only be directed to some of the measures enacted as a token of the complex problems faced by the new archbishop and the first Provincial Council. Precisely

[16] Cuevas IV, 513; see León, *Apuntamientos* [note 9], page v: "Apenas se habrá discutido alguna vez con mayor ardor y exageraciónes, principalmente en estos últimos tiempos, ningun monumento de nuestra historia, y con la muy especial circunstancia de que bien pocos de los contrincantes tenían conocimiento cierto del documento en cuestión. La historia de esta polémica requiere pluma más autorizada que la nuestra, y por eso es que dejándole á ella ese punto, hemos querido tan sólo encabezar tan escrito, con una litera nota bibliográfica."

[17] *Concilio Provincial Mexicano* IV, 197.

[18] *Enciclopedia Universal Ilustrada europeo-americana* [hereinafter cited as *Espasas*], LIII, 1252-1253, with a picture of Sancho.

[19] *Espasas* XX, 1116-1117, under *Escuela Pia*; *Catholic Encyclopedia* III, under *Clerks Regular of the Pious School; Enciclopedia Italiana* XXXI, 201, under *Scolopi.*

[20] Lawrence H. Gipson, *The Great War for the Empire: The Culmination 1760-1763* (New York, 1954), 275-281 [Vol. VIII in *The British Empire before the American Revolution*].

what occurred in the public and private sessions is at present unknown. The few sources that have come to hand are patently partisan while the unpublished sources, which must be abundant in Spanish and Roman archives, are unavailable.[21] A single fact, however, should be noticed in connection with the archbishop; after some fifteen years of experience in the Islands, Sancho was transferred in 1787 to Granada, certainly an earnest that his work and doctrine were esteemed by his ecclesiastical and royal superiors.[22]

The Council held six public sessions between May 19 and November 24, 1771. The legislation for each session was recorded in an *actio,* which was subdivided—as in most conciliar legislation—into titles, *decreta,* and canons or chapters. Some brief account of the legislation for the benefit of historians seems desirable before the manuscript is edited and published.[23]

The first action (*actio*) is concerned with the formal opening of the council with decisions on technical matters of procedure. It is noteworthy that extensive quotation from the Council of Trent on councils and reformation is found at the beginning of this part on procedure. The very form of the document reflects the impact of Trent not only on this, but on all the councils held in the colonial period.

[21] José Montero y Vidal, *Historia General de Filipinas* (Madrid, 1894), II, 249, note 1, mentions materials on the council in the Traggia Collection, Vols. XXV, XXVI, XLVII-XLIX in the Academy of History, Madrid. Edgar B. Wickberg, "Spanish Records in the Philippine National Achives," *HAHR* XXXV (1955), 88. In a letter, Mr. Wickberg assured me that at the moment there is no way of obtaining an evaluation of the historical materials in the archive of the Archdiocese of Manila.

[22] *Espasas,* LIII, 1253, "Gobernó el referido arzobispado [Manila] con gran celo, y traslado á la Metropolitana de Granada en 1787 falleció al ir á posesionarse de ella."

[23] The MS has been provisionally accepted for a dissertation subject for the degree of doctor of canon law under the direction of Professor Stephan Kuttner, School of Canon Law, Catholic University of America. The dissertation shall contain a text with canonical and historical commentary.

The second action contains four titles: *On the bishop's house; On the bishop's ministry; On visitation;* and *On synods.* For the biographer and the historian of any area embracing a single diocese, this action supplies a wealth of norms by which to measure the activities of a single prelate and his attention to his diocese. The first title defines the personnel immediately about the bishop, while the second stresses particular duties such as preaching, care for the poor, the unfortunates, and supervision of the whole parish, and especially the missionary districts called *doctrinas.*

The third title of the second action takes up at length the annual episcopal visitation to all parts of the diocese, which includes, under this heading, not only the parishes, but also the houses of all the orders in the diocese, as well as schools for girls. Here is a hotly contested matter which reveals the real sources of power during the Spanish control of the Islands. The orders had enjoyed many privileges and exemptions granted them by the papacy and the crown; and the common law of the Church recognized the freedom from episcopal visitation, with certain specified exceptions, as an essential right of the exempt orders. At this time, however, royal policy sought to use the secular church to further its own ends. Thus, the canons permitting episcopal visitation of religious houses point to the movement to bring once more under episcopal jurisdiction the members of the orders and to suppress monastic exemption as an institution. The legislation of 1771 was to put into operation this new policy.

The fourth title deals with provincial councils and diocesan synods; this latter ecclesiastical assembly was supposed to be the instrument for acquainting parish clergy with new legislation and any other matters concerning the population of the parish. This body had been used many times also to communicate royal orders, or announcements which the *Audencia* wanted broadcast. Other subjects touched on under this title include the monthly meetings in the cathedral, at which time judicial hearings were held.

The third action consists of two titles; the first of which is *On seminaries.* On its face, this would appear a simple matter; in reality it is a veritable volcano in that it refers to the recent expulsion of the Jesuits. To a large extent, the education of men for the priesthood, and all important educational institutions had been dominated by the Society. With their expulsion, a political and educational vacuum had developed. Who would fill it? Another question involved in this title is the question of the archbishop's personal sympathies. It was pointed out that Sancho was a member of the order of the *Escuela Pia,* that is, a member of a teaching order that is known to have succeeded the expelled Jesuits in various parts of Italy and Spain.

The second title, *On the life and manners of the clergy* is full of detail for the historian who wants to know intimately the strengths and weaknesses of the parish clergy in the Islands. Action four carries this analysis of the parish farther by its description of the educational work of the parish as well as its care of the poor and other related activities of social service; and, too, the problems in connection with conversion of the pagans. The canons on education and on conversion show some very shrewd, highly realistic insights into the matter on how best to carry on these activities. The once current phrase, 'accent on youth' neatly sums up the whole emphasis.

The fifth action with two titles, *On the Sacraments* and *On reformation,* is especially valuable for the historian and the sociologist. The administration of sacraments requires very specific conditions from those who would receive them. In describing the requirements, very many different sorts and conditions of people are mentioned. The reference to Armenians, for example, seems of special interest for the history of Philippine population. The sacrament of marriage in *decretum XVI* gives a picture of the conflict between immemorial Philippine practices and the Christian requirements. Under the sacrament of baptism (*decretum I*) is raised a series of

questions: who, for example, may be godparents to a child, one of whose grandparents is a pagan? The canons on the celebration of the Eucharist show the problems of conducting the liturgy and eradicating naive superstitions in the Far East, as in the prohibition against shooting off firecrackers at the consecration and elevation of the Host; or in the measures to be taken against stealing the reserved Host to feed it to fighting cocks!

The second title deals with miscellaneous matters pertaining to religious feasts—important to the historian for calendar indications; fasts to be observed by the Spanish and different ones for the natives; forbidden reading as set forth in the Index of Prohibited Books established at Trent; the matter of pious legacies and guardians (some aspects of guardianship appear to have been a veritable racket); and the problems relating to public malefactors, heretics, excommunications and lay abuses. *Decretum XV, On usury*—twenty-one canons—gives a series of usurious clauses in commonly used contracts. The indications are clear enough that usury was widespread in agriculture and commerce.

The short sixth action is concerned with the conclusion of the Council. The formal promulgation of the acts takes cognizance of the loyalty to the king and the necessity of submitting the legislation for correction and ecclesiastical approbation to the Sacred Congregation for the Council. The subscriptions and the notarial attestations conclude the document.

All the sources concur on one point: that the legislation of the Council was presented to the king who disdained it and ordered the bearer, Father Joaquín Traggia, an *Escolapio*, the Secretary of the Council, to his convent in Zaragoza and forbade his return to the Islands.[24] The trail ends here. Neither at the Vatican Library, nor in the Vatican Archives, nor in the archive of the Sacred Congregation for the Council, has a copy of the acts of this Council yet come to light; nor has a

[24] Blair and Robertson, *The Philippine Islands*, L, 416-442; Montero y Vidal, II, 249; Ferrando, *Historia*, V, 122-123.

copy been found in the General Archive of the Indies.[25] Legally then, the legislation of the first Provincial Council of Manila was void and had no force. Historically, the text is of great value for the light it sheds on Church, State, and society of the Philippine Islands at the end of the eighteenth century.

This summary investigation has sought to emphasize the importance of the study of Church history for widening and deepening the intellectual apparatus of Latin Americanists in the United States. It is a discipline essential for their vocation. The councils of the Spanish empire showed an underlying unity of structure and pattern for all the provincial councils—peninsular and colonial. In their turn, they depended from the General Council of Trent and the continuing efforts of the Holy See to reform the Church throughout its universal jurisdiction. But the Holy See during the entire period had to funnel its commands through the Spanish crown and the Council of the Indies' vigilant attention towards the *Patronato*. The history and fate of the acts of the Council of Manila are valuable for illustrating the complexities of the Church-and-State or, better, the religion-and-politics problem as well as the recurrent inner tensions of the secular and regular orders within the Church. The total picture portrays the imperial efforts of both Church and State in the process of extending new modes of thought and action to the millions of the Indies and the Philippines.

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[25] The late Msgr. Angelo Mercati, Prefect of the Vatican Archives to the writer, regarding the Roman archives; Sr. de la Peña, Director of the Archivo General de Indias, to Professor Hanke, who courteously informed the writer; an inquiry sent to the Archive of the Propaganda Fide was most courteously answered by Msgr. Dr. G. Monticone, who stated that neither at the Propaganda nor at various several religious institutes in Rome could any trace of these acts be found.

Notes and Reviews

THE PROJECT OF A NEW HISTORY OF ROMAN LAW IN THE MIDDLE AGES (IUS ROMANUM MEDII AEVI)

Since the publication in these pages (*Seminar* XI [1953] 89-101) of the first report on the project of a " New Savigny " a number of communications have been received from Professor Genzmer in Hamburg: minutes of meetings held by the central committee: changes in the division and distribution of the work; methodological directives for collaborators. The title of the cooperative work has been definitely fixed as *Ius romanum medii aevi*, a Latin name being preferable in an undertaking which will include contributions by an international team of collaborators in German, French, Italian, Spanish, and English. The general outline as revised foresees five parts in nine to ten volumes, Pt. I covering, after the general introduction, the time from the fall of the Western Empire to Irnerius (1000 pages in 2 volumes); Pt. II: the Universities, from 1100 A.D. to 1500 A.D. (400 pages); Pt. III: the Glossators from Irnerius to Accursius (725 pages in 2 volumes); Pt. IV: from Accursius to the Bartolists (700 pages in 2 volumes); Pt. V: the influence of Roman law and the legists on Canon law and the national laws (1500 pages in 2 or 3 volumes).

Among the methodological suggestions, some notes on terminology are of general interest. The committee urges that the schools of legal writers that begin with Bartolus and Cino da Pistoja be no longer called Post-Glossators, Post-Accursians, or (as the late Hermann Kantorowicz suggested) Consiliatores, but recommends to distinguish them as Commentators in a technical sense from the earlier Glossators. The committee further states that the usual term " Reception [of Roman law] " invites many misunderstandings, since modern authors frequently have identified " reception " with the statutory or customary introduction of the *Corpus iuris civilis* as a source of national law, thus narrowing down the investigation of Roman influences to a study of the formal sources, while

a history of Roman law in the Middle Ages should explore in its entirety, and regardless of its formal channels, the historical process by which institutions, doctrines, and rules of Roman law influenced or penetrated the legal order of the European nations. The history of this process, the committee goes on to say, has too often been studied merely from the angle of private law and civil procedure, with little attention paid to the importance of Roman law for the development of public law, government and administration, criminal law and criminal procedure. (Perhaps it may be added to this very pertinent observation that in Anglo-American writing it has been often the opposite tendency, viz. that of identifying the absolutist principles of Roman imperial government with "Civil law," which has beclouded the understanding of the historical role of Roman law in the Middle Ages.)

At the meeting in Brussels, September 29-October 1, 1955, four informal papers were presented: R. Feenstra (Leiden), Directions for an inquiry into the influence of Roman law on the national laws; S. Kuttner (Washington), Remarks on the place of Canon law in a general history of Roman law during the Middle Ages; Ph. Meylan (Lausanne), Report on the organization of Swiss research on Romanistic elements in the legal developments of Switzerland; S. Stelling-Michaud (Geneva), Note on University archives and recommendations for the use of their records by the collaborators of the "New Savigny."

Partly on the basis of these papers, a memorandum by Professor Genzmer considers the following topics as significant for assessing the influence of Roman law in a given national law, the individual elements listed being of course of different weight and importance in different countries:

I. *Agencies of Roman law: institutions and persons.*

1. Legal education: (*a*) foreign universities; (*b*) domestic universities; (*c*) other instruction.
2. Church and clergy: (*a*) "Ecclesia vivit lege romana"; (*b*) ecclesiastical jurisdiction (its extent; Romano-canonical procedure; Roman legal elements in Canon law; direct application of Roman law); (*c*) arbitration by ecclesiastics; (*d*) administration of temporalities in territories of the Church; (*e*) ecclesiastical councillors of secular rulers;

(*f*) jurisdictional functions connected with parochial care of souls; (*g*) clerical notaries, etc.

3. Secular jurists and clerics in minor orders as professional jurists: (*a*) legists in the service of secular rulers; (*b*) legists in the service of municipalities (communal clerks, communal attorneys); (*c*) notaries.

II. *Literary channels of Roman law.*

1. Imported writings of glossators and commentators (Azo, Accursius, Bartolus, etc.).
2. Treatises on procedure.
3. Vocabularies of Roman and Canon law; other "popular" literature.
4. *Summae confessorum.*
5. Formularies and collected form letters containing Romanistic elements.
6. Translation of Roman law books in the vernacular.
7. Romanistic elements in books recording the law of the land, in codified *coutumes,* local statutes, etc.; Romanizing glosses on these law books.
8. Legal opinions based on Roman law.

III. *Influences and importance of Roman law.*

1. Formal and substantive influences of Roman law on the legislation of the Empire, of national rulers, and cities.
2. Subsidiary force of Roman law by statutory precept in national laws, codified *coutumes,* municipal laws.
3. Romanization of domestic law, e.g., in the general doctrines of private law (law of persons, obligations, inheritance), civil procedure, criminal law and procedure, etc. Barring of certain institutions from legal practice, e.g., by the contractual waiver of pleading Roman defences (*renuntiationes*); sources of standard formulae of such waivers, e.g., in the *Tractatus notularum* of Rolandinus Passagerii, etc.

Concerning the bibliographical needs of a general history of Roman law in the Middle Ages, the following communication has been received from Professor H. Coing in Frankfurt-am-Main, with the request of making it available to the readers of this periodical:

The International Congress for Comparative Legal Studies, held by the Academy of Comparative Law at Paris in August 1955, resolved that the Academy provide for the creation of a bibliography covering publications on the history of Roman law in the European countries during the Middle Ages. The *Institut für Römisches Recht und Rezeptiongeschichte* at the University of Frankfurt-am-Main has been put in charge of this project.

In its initial stage, the bibliography will be established in form of a card index in three sections. Section I is to cover the names of authors in alphabetical order regardless of nationality. Section II is planned as a subject index, alphabetically arranged by the lemmata which will result from the contents of the publications to be analyzed. Section III will be a classified subject index, divided by historical periods: the Middle Ages (Roman and Canon law separately); the age of Reception; of the *Usus modernus;* of the rationalist Law of Nature. For each of these periods the topical arrangement will follow more or less the doctrinal system of the modern Pandectists.

The Academy has expressed the desire that summary notices of pertinent publications, indicating at least the title, be sent by the respective authors themselves to the Institute in Frankfurt.

The Editors of *Seminar* warmly endorse this undertaking and hope that the publication of the announcement in this and in other periodicals will help to get the bibliographical index under way.

ON THE PLACE OF CANON LAW IN A GENERAL HISTORY OF ROMAN LAW DURING THE MIDDLE AGES *

Within the compass of the " New Savigny " the history of Canon law during its classical period takes a place not for its own sake, but rather on account of the interrelations which affected the developments, both in theory and in practice, of the two laws in the Middle Ages. These relationships are all the more important because either of the two legal systems on principle had a claim to universal validity; yet together, in their scholarly elaboration as *ius utrumque,* they stood over against all particular legal orders.

* Remarks delivered at the Brussels Conference, October 1, 1956.

Two historical phenomena are to be explored and described: (1) in the history of ecclesiastical institutions and canonistic thought, Roman law appears, from the time of the Glossators on, as a significant factor of development; (2) in the general legal history of the later Middle Ages, Canon law appears as an effective mediator of the Romanistic elements it had absorbed. Thus several sets of problems emerge for research—problems which, to be sure, are connected with one another but which will have to be studied with the aid of different source materials.

1. At the center of the first field of inquiry we find the creation of the Church's *ius commune* since the mid-twelfth century through the literary efforts of the glossatorial schools and through curial practice as embodied in the papal decretals. Classical Canon law was a jurist-made law, constantly developing as a rational and practical, flexible and authoritative order. It owed this character to the close collaboration of the schools and the Curia: for about two centuries, the learned exposition of the canonical material by the glossators and the judicial, didactic, and legislative activity of the popes, who for the most part themselves were trained canonists, mutually supplemented and corrected each other. Both for the academic production and the curial practice, the Romanistic element was of fundamental importance.

The rise of canonistic jurisprudence has been convincingly called the product of an encounter between theology and Roman law. This statement holds even for the work of Gratian, quite independently from the question whether the texts from Justinian's compilation which are found in the *Decretum* belonged to Gratian's original plan (according to recent research, this has become extremely doubtful). What took place in the twelfth century was not primarily a "reception" in the sense of borrowing the Roman legal sources. Rather, the material of the ancient discipline of the Church—the *sacri canones* and *decreta sanctorum patrum*—was interpreted with the application of civilian concepts, constructions, and arguments. In other words, the decisive signs of influence are found, not in the relatively few *leges canonizatae* which were incorporated in the canonical collections, but in the fact that Roman legal thought was consistently woven into the entire fabric of the law and that Roman institutions were substantially assimilated and transformed into ecclesiastical ones. Honorius III's famous pro-

hibition against the study of civil law (1219) could not exclude this influence, nor was it intended to do so. One need only consider the abundance of quotations which appear in the discussion of purely canonistic problems on practically any page of the *Glossa ordinaria* to the *Decretum* or to the *Decretales*. Doctrines of civil law permeate the Canon law of procedure, property, and contracts; Roman legal concepts play a part even in shaping the doctrines of marriage or of ecclesiastical delicts. The details of this Romanistic penetration and its channels will have to be described in the literary history of the canonistic schools of Italy, France, the Rhineland, and the Anglo-Norman kingdom.

The decretals, even in their formal aspect, show a similar contact and connection between ecclesiastical and Romanistic elements. As an instrument of papal instruction and papal determination of law, the *epistula decretalis* goes back to the chancery usage of the fourth century. In the classical period, however, the decretal was deliberately made to resemble the imperial rescripts and decrees of late antiquity, and this led to a transformation of judicial procedures and of the methods of lawmaking—a transformation in which we find certain problems of the late Empire repeated on the ecclesiastical plane: thus, e.g., the problem of the general validity of responses given for individual cases, and the final solution to this problem through codification. Differently from Roman legal history, however, this development did not occur in a period when the creative power of jurist-made law had already died out. On the contrary, it took place at the high point of the classical age of Canon law.

2. In the perspective of the general history of Canon law, the decretals appear above all, through the official collections, as codifications of the law of the universal Church. At the same time, or rather in the first place, historically speaking, the decretals are important sources for the knowledge of ecclesiastical practice in individual cases. From this point of view, they provide the foremost instances of a much more widespread phenomenon: namely, the role which Canon law, as a transmitter of Roman legal tradition, played in the day-to-day life of the later Middle Ages. For it remained merely a theoretical postulate that the law of the *Corpus iuris civilis*, as taught by the legists, enjoyed universal validity; its function as a subsidiary " common " law differed from place to place,

according to local legal practice. The universal validity of Canon law, however, was a reality in the ecclesiastical sphere of jurisdiction, even in those places where national religious policy and legislation restricted it or denied recognition to it. Consequently, ecclesiastical practice, as carrier of the only universally valid legal system which pervaded the entire European world, became the most important and the most effective vehicle in the "reception" of Roman law. It follows that this was a matter of transmitting, not "pure" Roman law, but a Roman law which was canonistically developed, often reinterpreted and modified by specific moral principles of the Church. Individual results of this process—for example, in the law of adverse possession, of the formless contract, of possessory remedies, of annulment of marriages—are well known. The general phenomenon, however, still needs further detailed investigation.

There emerges here a promising field for research: suffice it to mention the spread of Romano-canonical procedure, of the canonical forms of summary proceedings, of judicial delegation; the recourse to the *officium iudicis* by *denuntiatio evangelica*, which through its corrective function overlaps (as *aequitas canonica*) into substantive law; ecclesiastical jurisdiction on marriage and wills, and the legal protection of *miserabiles personae*. In order to realize how the daily *minutiae* of canonical practice influenced the legal world, one would have to assess the actual achievements of the legally trained clergy—the class which was so much decried in proverbial sayings and literary satire—in the offices of the Roman Curia, in the diocesan curiae, and in the administration of the temporalities of ecclesiastical territories. A great deal of prosopographical and statistical research in this field remains to be done. One might recall the interlocking of administrative, judicial (*audientia litterarum contradictarum*), and legislative functions (*regulae cancelleriae*) in the Apostolic Chancery; or the judicial and governmental functions of the Apostolic Chamber in the Pontifical States. All of this is repeated on a smaller scale in the bishoprics and the archdeaconries.

A history of the legal knowledge of the parish clergy would form a further topic of research. It is of more than sociological interest, for jurisdictional functions were connected with the care of souls, and in the later Middle Ages prelacy and *cura animarum* even ap-

pear as related concepts. In this period the complaint about the ignorant parish priest is a commonplace; however, it should be remembered that in the thirteenth century papal legislation endeavored to encourage university studies among the parochial clergy—including the study of law. In this connection one may mention the authority given the bishop to dispense, until the completion of studies, from the obligation of residence and from the obligation to receive priestly ordination; or the statutory exception, for incumbents of simple parish benefices, from the prohibition against the study of civil law. Both of these provisions became definitely established in the legislation of Boniface VIII, but their practical operation must be studied in local history. One should also point out that even the reading of the "popular" legal literature (to use Stintzing's terminology) for the most part presupposed a level of legal knowledge which one would hardly expect to find today in a parish priest who has received no university training.

3. The task of describing the different aspects of the interrelations between Roman and Canon law—and in this respect the above sketch does not pretend to be exhaustive—requires the exploration of a highly diversified source material. As for the literary history of Canon law, adequate studies on the first century of the glossatorial schools (1140–1234) are now available. But for the period beginning with Gregory IX, modern research has surpassed Schulte's work only in isolated instances: a comprehensive repertorium of the scholarly production of the thirteenth and fourteenth centuries is still lacking. The same situation prevails with regard to our knowledge of the decretals outside of the traditional collections.

For the description of canonical practice, most of the preliminary work remains to be done. Collections of the decisions of the Roman Rota began to appear only in the second half of the fourteenth century. Local research in different countries has made available much material on the registers of episcopal officialates, on archidiaconal acta, on the registers of visitations and the like. A systematic evaluation of this material would be rewarding for the purposes of the "New Savigny." Finally, a thorough study of the collections of *quaestiones* and *consilia* promises abundant material for our knowledge of the reciprocal enrichment of theory and practice, as soon as the necessary indices and monographic studies in this area will have been begun.

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TWO DISPUTED CHAPTERS IN *LEGES HENRICI PRIMI*

The source of the current problem of benefit of counsel in criminal cases, under the 14th Amendment due process clause of the United States Constitution, can be found in Greek and Roman law.[1] The problem of the origin of the English rule against benefit of counsel is open to serious dispute. Mr. Justice Roberts in *Betts v. Brady* 316 stated: "Originally in England a prisoner was not permitted to be heard by counsel upon the general issue of not guilty on any indictment for treason or felony." The question should be raised, "how far back does 'originally' date?" Modern historians of English law agree that the first evidence of the rule is to be found shortly before 1118, in chapters 47 and 48 of the *Leges Henrici Primi*.[2] This important book, which they believe to be the source of the present rule, is neither *leges* nor *Henrici Primi,* but is a private compilation of law. The title of the book is deceptive. *Leges Henrici* refers only to the coronation charter which introduces the book. The author "is not forging laws for Henry I"; he is writing a text-book about law, which is neither Canon nor Roman.[3]

Before an examination of the contents of chapters 47 and 48 of *Leges Henrici* is made, in order to determine what is actually contained in them, it might be valid to examine the interpretations given to them by modern historians of the law. Melville Bigelow states that, according to chapters 47 and 48 of *The Laws of Henry I,* an individual accused of "theft, murder, treason, robbery, outlawry, house-breaking, arson, counterfeiting, and capital crimes

[1] A. Esmein, *A History of Continental Criminal Procedure,* trans. by J. Simpson (Boston, 1913), pp. 23 ff.; C. P. Sherman, *Roman Law in the Modern World* (New Haven, 1922), II, p. 487.

[2] The preface must have been written before 1118, since it treats Queen Matilda as still alive. F. Liebermann, in *Forschungen zur deutschen Geschichte,* XVI (Göttingen, 1876), 582. Liebermann, the master of medieval legal texts, answers those who would date the laws later. Wm. Stubbs, *Constitutional History* (Oxford, 1883), I, 533. Stubbs follows Liebermann.

[3] F. Pollock and F. W. Maitland, *The History of English Law* (2nd ed.; Cambridge, 1905), I, 101. W. S. Holdsworth, *Sources and Literature of English Law* (Oxford, 1925), p. 24; W. S. Holdsworth, *The History of English Law,* II (Boston, 1923), 151-154.

generally . . . was to be put upon trial at once, without even counsel." [4] In cases other than capital crimes the accused was not denied counsel, but was permitted to take counsel with his relatives and friends.[5]

Pollock and Maitland draw the same conclusions about the meaning of the laws.

> Still in yet ancient days a litigant is allowed to bring into court with him a party of friends and to take counsel with them before he pleads. In the *Leges Henrici* (47, 48) it is already the peculiar mark of an accusation of felony that the accused is allowed no counsel, but must answer at once; in all other cases a man may have counsel.[6]

Their contention, based in part on *Leges Henrici,* is that a person who appealed might use a professional pleader; but that no counsel was permitted to an individual " who was arraigned at the King's suit." [7]

William Holdsworth interprets the laws in a similar manner. The defendant was permitted *consilium* unless he was accused of a capital crime (felony or treason). Individuals charged with these offenses were denied *consilium* by *Leges Henrici,* chapters 47 and 48.[8] Rightmire,[9] Pulling [10] and Cohen [11] present like interpretations.

It might be profitable, at this point, to turn to *The Laws* themselves. Does their content justify the conclusions drawn from them by the modern legal historians? Chapter 47 states that in " capital cases, nobody may ask for *consilium* " who is accused of felony or treason, no matter what " his nationality or rank may be." [12] This statement appears to support the conclusions of the experts. Chapter 48, however, demonstrates that their analysis is some distance from the truth. A reading of the text demonstrates

[4] M. Bigelow, *History of Procedure in England* (Boston, 1880), p. 229.

[5] *Ibid.*, p. 218.

[6] F. Pollock and F. W. Maitland, *op. cit.*, I, 211.

[7] *Ibid.*, II, 653.

[8] W. S. Holdsworth, *History,* II, 312.

[9] G. Rightmire, *The Law of England at the Norman Conquest* (Columbus, 1932), p. 35.

[10] A. Pulling, *The Order of the Coif* (Boston, 1880), p. 218.

[11] H. Cohen, *A History of the Bar* (London, 1929), pp. 11-12.

[12] F. Liebermann, *Die Gesetze der Angelsachsen* (Halle, 1903), I, 570-571.

that the *consilium* which is denied the defendant is not counsel in court, but a delay for a conference. Proof of this is established by the following passage:

> If, namely, an accused walks out from a king's court to the *consilium*, and does not answer the accusation immediately, he forfeits a fine of 20 marks. Because he who has been charged must show up personally for the accusation and must not go out to the *consilium* which does not deliberate the charge; for this is the finding: if someone without contradiction or exception walks out from the charging to the *consilium*, he enters into the charge; and he [who] does not immediately answer, he shall have conceded.[13]

It is clear from this passage, that *consilium* occurs outside of the courtroom.[14] The defendant seeks advice from his friends, this is denied by *The Laws of Henry I.* The laws say nothing about denial of counsel. Holdsworth, Maitland and the other historians of the law, however, have interpreted this to mean that the accused could not have a pleader in court to defend him in cases of felony and treason. The modern commentators have confused *consilium* (advice) with *advocatus* and *forespreca* (counsel or pleader). Liebermann defines *consilium* as "the circle of advisors, the friends' advice given a litigant in regard to answers to be given in a litigation (words to be spoken) outside the room or circle of the court; their advice."[15] The accused appeared in court with his friends and kinsmen. He asks for *consilium* (advice) from these friends and relatives and from his lord. At this *consilium* (imparlance), they discuss what the *forespreca* (*advocatus*) is to argue.[16] In cases involving capital offenses, or before a royal judge, or his own lord, the defendant must reply immediately to the charge before he may obtain *consilium*.[17]

[13] *Ibid.* The author's Latin is very poor and interferes with his attempt to state the law in rational form.

[14] Blackstone believes this *consilium* is an *imparlance*. His analysis of the problem appears to be correct. His use of historical evidence to support his contention is open to serious dispute. Sir Wm. Blackstone, *Commentaries on the Laws of England* (London, 1830), IV, 355.

[15] F. Liebermann, *op. cit.*, II, 1, 39.

[16] *Ibid.*, II, 2, 626. Liebermann uses the word "plaedieren," which in German means not merely "to plead"—i.e., guilty or not—but means oral argument.

[17] *Ibid.*

Leges Henrici Primi is not the source of origin of the rule which denied benefit of counsel in capital cases. The procedural prohibition appears to have developed much later, in the fourteenth and fifteenth centuries.[18] It does not appear to be a part of medieval law,[19] it may have been incorporated into the common law through a mistranslation of *consilium*. Even in the sixteenth, seventeenth and eighteenth centuries, the application of the rule of denial of benefit counsel was limited; men like Blackstone suspected the historical validity of the rule.[20]

The Supreme Court in a recent decision perpetuated the *communis error* that this rule was part of ancient English law. Finely gilded decisions and involved rationalization cannot conceal "the inherent flaws" of faulty history. "Nor can they avert the peril that bad history may in turn make bad law."[21]

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Das römische Privatrecht. Erster Abschnitt: Das altrömische, das vorklassische und klassische Recht. (Rechtsgeschichte des Altertums im Rahmen des Handbuchs der Altertumswissenschaft, Dritter Teil, dritter Band, erster Abschnitt.) Von Max Kaser. München: C. H. Beck'sche Verlagsbuchhandlung, 1955. xxvi, 651 pp.

The plan of adding to the *Handbuch der Altertumswissenschaft* a series of volumes dealing with the legal history of antiquity, thereby filling the gap that had been left open in the famous enterprise, was first conceived by its former editor, Walter Otto. After the war, Marian San Nicolò, put in charge of this branch of the

[18] *Year Book*, 9, Edward IV. "And note that the defendant in indictment of felony shall not have counsel against the King if it is not a matter in law, but in appeal it is otherwise." W. S. Holdsworth, *op. cit.*, II, 260 ff.

[19] *Britton*, trans. F. M. Nichols (Washington, D. C., 1901), p. 81; *Second Statute of Westminister*, c. 10, *Statutes of the Realm.*

[20] Cf. author's article "Benefit of Counsel in Criminal Cases in Coke" to be published in the *Miami Law Quarterly.*

[21] J. Goebel, Jr., *Felony and Misdemeanor* (New York, 1937), p. xviii.

Handbuch after Otto's death in 1941 (and succeeded in this capacity after his own death on May 15, 1955, by the general editor, Hermann Bengtson), organized the work by laying out its general scheme and distributing its various parts among the contributors. In 1955 the great effort bore its first fruits with the publication of Arthur Steinwenter's brief but highly instructive survey of what legal information can be gathered from Coptic sources (*Das Recht der koptischen Urkunden*), and with the appearance of the book which is the subject of this review.

The general purpose of the *Handbuch,* as well as the state and spirit of contemporary Romanistic research, called for a statement that would fit the institutions and legal thought of the Romans into their historical setting, presenting them as a system of techniques and ideas slowly growing out of the development of the nation itself. Having been successfully engaged for more than twenty years in research on a vast variety of problems arising from the history of Roman law, and having contributed more than any other Romanist of this generation to the formation of our present picture of the early stages of Roman law, Max Kaser in fact seems to have been the natural choice for such a task. The result fully justifies the choice.

Following a few introductory pages in which the Roman approach to law is briefly explained and the reader informed about the types of sources available, as well as about the trends prevailing in contemporary Romanistic research, the bulk of the book is made up of a description of the institutions of Roman private law, arranged according to their various historical and systematic aspects. Matters of primarily procedural nature have been omitted and reserved for a handbook of their own, also to be written by Kaser. It should be remarked, however, that this has not resulted in any unhistorical disregard for the typical interpenetration of the principles of substantive law and those specific remedies which secured their realization. On the contrary, when concepts of substantive law, such as, for instance, the notion of ownership, owe their origin to direct abstraction from the practical effects of methods applied in the protection of certain legal positions, such methods and their role have been pointed out. But also outside of those institutions, the very understanding of which depends on an

analysis of the forms of action designed to implement them, the part played in the formation and elaboration of rules of law by procedural ways of dealing with underlying factual situations has been given due attention.

In a book which, like the one under review, is supposed to offer a comprehensive survey of the state of knowledge reached at the time of its composition, nobody will expect extensive analysis of controversial problems or a display of new solutions which could be proposed only by way of a monographic discussion of sources and opinions. It is therefore in accordance with the purpose of his undertaking that the author has in the main confined himself to stating his own views without either branching out into lengthy debate of limited topics or trying to venture far into the hitherto-unknown. This should not be understood, of course, to mean that Kaser's new work is lacking the distinct mark of his own scholarly personality. All through the book we are presented with a critical and considered account of the newest results of Romanistic research, and the author does by no means refrain from taking his own stand whenever dealing with unsettled questions. But the chief value of his achievement lies in that he successfully comprises the whole of the Roman legal development, during the periods covered, in one grand panorama, which is consistent and at the same time takes into account the dynamic forces that were responsible for the evolution and final shaping of the institutions and their underlying concepts. This panorama, documented by the citation of a wealth of sources and based on a sovereign command of the immense literature, is spread before the reader's eyes in exemplary perspicuity, which is all the more admirable since the liveliness and completeness of the picture is assured by the inclusion of an amazing mass of detail.

Confronted with the problem of adjusting the historical and systematic aspects of his subject to one another, the author has broken up its history into three periods, each of which has been, or will be, treated separately by giving a full account of the institutional and doctrinal contents of the law in the light of the particular conditions characterizing that period. The dividing line between the first two periods he places around the middle of the third century B.C., this being the time when, in consequence of Rome's

taking her first steps toward becoming the center and ruler of a world empire, the Roman people were beginning to replace their earlier rural way of life by one of a predominantly urban and money-directed society, with the effect that the original peasant mentality gave way to a more commercial attitude. The third period, to be dealt with in the second volume, is that of the decadence of Roman law, stretching from the extinction of classical jurisprudence in the middle of the third century A.D. to Justinian's codification.

The relegation of the third period to a separate treatise was at least in part forced on the author by technical difficulties, inasmuch as the present state of research on the later stages of Roman law made a postponement of their treatment appear advisable. As to this point, there is no place for argument on the author's decision. The situation is different, however, as regards the structure of the first part of his work, here under review. The reviewer wonders if the disadvantages of the arrangement of matter chosen by Kaser do not outweigh its advantages.

Considering the latter, we are bound to state that the author's method undoubtedly proved an effective tool for bringing out in great clarity the fundamental contrast which existed between the *ius civile* and the later law, such as it emerged from the creative activities of praetors and jurisconsults. It enabled him to show that this difference was not merely one of less developed institutions in the earlier period and a greater flexibility of the law, owing to a more sophisticated approach, in later times. We acknowledge without hesitation that Kaser has succeeded in setting forth the deep change in spirit which the law underwent in republican times. It may be that he is stressing the economic causes of the change a little too exclusively at the expense of others, such as the crowding out of the *pontifices* by secular advisers. But with this reservation we agree that it was the transformation of the social texture of the Roman people which caused Roman legal thought to shift emphasis from the " house " to the patrimonial interests and to conceive the law of obligations no longer as a set of rites devised for the purpose of establishing and realizing liabilities, but primarily as a system of principles and remedies aiming at the regulation of mutual relations springing from an intense business intercourse.

There is, however, inherent in any fixing of historical periods the risk of forcing the dynamics of an evolution into too rigid a scheme. Obviously aware of this danger, Kaser strove to avoid it by prefacing the second part of his book as a whole, as well as each of its main sections, with preliminary chapters which inform the reader about the nature, causes, and factors of such legal progress as occurred during the period covered. These introductions, giving a vivid and duly diversified picture of the process of change undergone by each branch of Roman private law, and pointing out lucidly the characteristic mixture of conservative and progressive elements which in their totality made up what we call the classical Roman law, certainly contribute much to the outstanding quality of this treatise. Still, for all their intrinsic excellence, these attempts at bridging over the gap appearing in the book between the two systems of law have not been sufficient to soften a certain stiffness of the presentation which, so it seems to the reviewer, might have been avoided, if the author had chosen a different arrangement.

Apart from necessitating some repetition otherwise avoidable, the device of going twice through the whole system of law cannot help creating—though certainly against the author's own intention —the impression that the history of Roman institutions suffered a sort of break about the time of the Hannibalic War and that the archaic system of law was then rapidly collapsing under the impact of new forms of social and economic life. For the simple confrontation of two complete systems of law—one archaic and adequate to a peasant way of life, the other modernized and adjusted to the interests of a predominantly commercial society (actually the classical system)—is apt to obscure the multiple, and by no means entirely coinciding, stages through which society and law passed in the process of their respective transformations. This is not of course to be understood to the effect that the author actually presented a grossly distorted picture; especially the second part of the book leaves no doubt about the fact that the system described there was the result of an evolution the stages of which are displayed before the reader. Nevertheless, the reviewer is inclined to believe that the dynamics of the historical process might appear in a sharper light, and the relative import of the several factors making for change and progress emerge more distinctly de-

fined, if the author had followed through, one after the other, the spheres of family, succession, property, and obligations, each time describing their particular development from their earliest forms recognizable to us to their institutional shapes and ramifications and doctrinal import in classical times.

The foregoing criticism is aimed merely at one of the formal characteristics of Kaser's work. As far as the substance of the treatise is concerned, the reviewer wishes to repeat his admiration for its high standard of scholarship, an admiration which is not diminished by the inevitable fact that now and then he is unable to agree with the author on controversial issues. As was already indicated, the book is much more than a mere compilation of results reached either by others or by the author himself in earlier research. It opens up new vistas in a number of chapters; more so in the second part than in the sections dealing with the archaic law, which are in the main a restatement of theories laid down in the author's own previous publications. An incomplete list of sections deserving special mention would include those concerning the interpretation of legal acts and the influence of mistakes (58; p. 206), agency (62; p. 225), the social and legal aspects of slavery (67; p. 244), the limits of liability (118; p. 419), and innominate contracts (135; p. 484).

Taking the treatise as a whole, Romanistic science is to be congratulated on possessing this new survey of its central subject. All the demands to be made on a handbook are met. It is a safe guide through the field, providing precise information on the present state of knowledge, indicating unsettled questions, and giving an almost complete access to modern literature, especially of recent years. It is safe to say that for a long time to come Kaser's book will maintain its rank as a reliable point of reference and as an instigator of new research.

An index of subject-matter concludes the volume under review; an index of sources will be attached to the second volume.

Hans Julius Wolff

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Paolo Frezza, *Corso di Storia del Diritto Romano.* Roma: Editrice Studium, 1954. viii, 445 pp.

The first objective of the author was to produce a manual for the students of law and history. But, in addition, he wished to contribute to the study of the history of Roman law in the only way possible in a book of this type—he included in this comprehensive presentation over a thousand years of history a review and analysis of the methodological aspects of the study of Roman law, and adopted a new organization of the material. The history and development of Roman public law are treated separately from the history of the sources of Roman law in general.

Thus, the book consists of two major parts. Part one, in ten chapters describing various periods of the history of the institutions of Roman law, which could be properly entitled the constitutional history of Rome, ends with the reign of Justinian. The other part, under a separate title, *Fonti del Diritto,* consists of three chapters and deals with the sources of Roman law. The first part treats, in order to explain the growth and the institutions of Roman law, the rise and development of Rome from a Latin city to the Empire, including the political and economic changes, their influence on the form of government and the sources of political authority. The second deals with the development of legal ideas and institutions as embodied in the monuments of Roman law. The principle of periodization used in both parts is provided by the changes in the constitutional system of Rome—the period of royal government, republican Rome, principate, which ended with the reforms of Diocletian, and finally the period of he absolute government (*dominate*).

The question may be asked whether there lies a methodological merit in the division of the book into these two major parts. It is possible that the author wanted to adapt his manual for use by students of history, by placing the material of interest exclusively for the student of law in a separate part. But apart from this utilitarian purpose, little seems to be gained by this division of the book, and one may, without difficulty, integrate various paragraphs and chapters of the second part, dealing with the sources of Roman law, with the first part, as the constitutional history of Rome is being told.

Two indexes, one of references to sources, the other, an author index, complete the volume.

One is always tempted, when a slim volume deals with a subject of this magnitude and importance, to look for omissions, lacunae, or inadequate treatment of important aspects in the development of Roman public law and its institutions. However, the author makes no pretence to have written an exhaustive work. He is primarily concerned with those aspects of the history of the Roman constitutional law and of the sources of Roman law, which, as the author says, "provide the coherent continuity of historical development."

The book is the result of twelve years of teaching and research which, although perhaps not fully reflected in the size of the volume, are easily discernible in the excellence of presentation, precision of formulation, and rich references to international literature on the subject.

K. Grzybowski

Law Library
Library of Congress

Hermann Lange, *Schadensersatz und Privatstrafe in der mittelalterlichen Rechtstheorie* (Forschungen zur neueren Privatrechtsgeschichte, . . . herausgegeben von Franz Beyerle und Wolfgang Kunkel, Vol. II). Münster/Köln: Böhlau-Verlag, 1955. viii, 182 pp.

The book under review is an excellent piece of research in medieval jurisprudence. In refreshing conciseness, the author presents the history of legal doctrines in a highly technical and complex field by way of a systematic investigation of the individual legal problems as they were perceived, formulated, and discussed in the writings of the glossators and commentators, thus recapturing in outline the essential achievements of legal theory in this field at a significant stage of its development. Such a method, which requires juridical acumen no less than a full command of the source material, is *Dogmengeschichte* at its best, and we may expect from its results much greater historical insights than from the

customary manner of stringing together, in descriptive fashion, the teachings of individual writers of the old schools.

The object of Dr. Lange's study is the contribution made by the medieval civilians to the development of a general theory of compensation for damages, especially in contractual and delictual obligations, on the basis of the bewildering casuistry which the *Corpus iuris civilis* put in their hands. Such a general theory would have found no place in the classical system of actions, nor did it develop in Byzantine jurisprudence even when the formulaic procedure and the absolute rule of *condemnatio pecuniaria* had come to an end in Justinian's law. Yet for the glossators' analytic and systematic bend, nearly all the elements for abstract differentiations between objective and subjective criteria of damages, between the stricter and the more liberal assessment of values lay readily available in the rich variety of decisions which the sources presented to them, and Dr. Lange shows how they operated with their authorities in elaborating a general concept of *interesse;* in subdividing it into *interesse circa rem* and *extra rem, interesse commune, singulare,* and *conventum*; in allowing or disallowing an estimate of affective value; rationalizing the inconsistencies of Justinian's law concerning the award of *lucrum cessans;* modifying the principles of distributive justice by considerations borrowed from the retributive principles of penal imputation, as a consequence of the gradual absorption of private penal actions in the civil liability for damages; and so forth.

In each section the author first surveys the Roman source material pertinent to the discussions of the medieval jurists, his brief observations on the classical and post-classical strata serving mainly to point out the antinomies which challenged the glossators' dialectical acumen. As for the medieval jurists themselves, Dr. Lange bases his inquiry on a sparing selection, with the *Glossa ordinaria* and Azo representing the doctrines of the civilian glossators, and Bartolus' commentaries and the *Speculum iudiciale* of Durantis, those of the post-Accursian school. The *Corpus iuris canonici* and its *Glossa ordinaria* are cited wherever Dr. Lange finds canonistic influences. His thorough examination of these texts indeed affords a vivid picture of the main stream of learned opinion. A full account of the doctrinal developments would, of course, demand future extension of the inquiry in several directions.

First, it has not escaped the author that the most important new doctrines of the glossatorial school were elaborated long before the *Glossa ordinaria* (cf. p. 157 n. 23); yet for the discussions of the early glossators he has to rely on what Accursius incorporated or reported in his *Apparatus,* on Azo's *Summae,* and on the small number of pertinent texts found in such modern publications as Haenel's *Dissensiones dominorum,* Seckel's *Distinctiones glossatorum,* Pescatore's *Beiträge.* In the one instance where a problem of textual criticism arises—the two recensions of the Accursian gloss—Lange is forced to a conjectural argument, since manuscript research was outside the scope of his study (p. 37f.; beside Seckel's discovery of a manuscript of the first recension of the *Glossa Institutionum,* a reference to Torelli's studies and his—partly printed but unpublished—new edition should have been made, *ibid.* n. 21).

Second, granted that Bartolus became for the generations after him the most influential jurist and almost a symbol of the *mos italicus,* only a study of the works of the major commentators who preceded him or were more or less his contemporaries, including their *consilia,* can give us the true perspective of Bartolus' importance as a legal thinker. One would also like to know more of the contributions of the masters of Orleans, of whom only Jacques de Révigny appears on the pages of Dr. Lange's book, and then only in contexts where Bartolus cites him for polemical purposes.

Third, the doctrines of the leading canonists of the thirteenth century on topics of liability and compensation, in their connection with the civilians' teaching, will eventually have to be studied on a broader basis. Dr. Lange rightly senses their importance, e.g., in the widened application of the *iuramentum in litem,* the extension of the liability of heirs, or the theory of *lucrum cessans.* But the consideration of natural justice and *aequitas* in this latter field goes certainly farther back than Durantis (on whom cf. p. 42; much light has been shed on origin, form, and practical influence of the canonical doctrine of *aequitas* [cf. also p. 166] in a series of important studies by Charles Lefebvre). Durantis' contribution to the interpretation of substantive law should, quite generally, not be overrated; on the other hand, Hostiensis—to cite only the greatest of the Roman law scholars among the decretalists—should not be bypassed in any discussion that touches upon the canonistic

elements in medieval private law. A fuller knowledge of the canonists would also lead to a revision of judgment on the theory of *interesse* in relation to usury (pp. 62ff.): in the recognition of "legal" interest we have not to see an attack from the outside, directed against, or dangerous to, the canonists' teaching on usury, but a gradual and morally consistent clarification, germane to that teaching itself.

An outstanding feature of the book is the concluding chapter (pp. 151-170), which contains a general historical evaluation of the accomplishments and characteristics of medieval jurisprudence as they emerge from the material examined in the main portion of the monographic study. Dr. Lange's well documented observations should help to discredit the still widely accepted cliché which presents the glossators as merely analytical exegetes and ascribes all new principles of scientific discovery and systematic thought to the commentators after Accursius. As for certain frequent misconceptions concerning the connections between scholasticism and the medieval jurists, Lange's precise analysis reduces the problem to its proper terms: the scholastic component lies in the methods and forms of reasoning which the glossators applied to their sources and which enabled them to derive new theories by generalizing interpretations, by abstractions and distinctions, from the particularized *auctoritates* of the law books. In this respect the glossators were undoubtedly scholastics: the "scholasticism" so often asserted as a hallmark of Bartolus and the commentators was only a matter of degree, not of principle. In substance, however, the legists' argumentation was specifically juristic, that is to say, determined by the *leges*, and not to any appreciable extent by philosophy, rhetoric, or theology. The point is well taken; and the reviewer, whose own experience lies with the glossators of Canon law, finds his own observations in that field confirmed by the parallels which Dr. Lange's solidly substantiated conclusions provide. Allowing for some minor disagreements on such points of detail as the interpretation of gl. Dig. 1.1.10.2 v. *notitia*, or of Dist. 37 cc. 3-6 (p. 165f.), the reviewer would consider this concluding chapter of the book one of the most competent modern characterizations of medieval legal thought.

Stephan Kuttner

The Catholic University of America

INSTITUTE OF RESEARCH AND STUDY IN MEDIEVAL CANON LAW

The Institute was founded in Washington, D. C., in May 1955. It is an autonomous corporation, privately endowed, to serve as a center for promoting and coordinating the scientific investigation of medieval canon law and, in particular, the preparation of critical editions of the works of medieval decretists and decretalists, together with a new edition of the *Decretum Gratiani.*

The urgent need for modern, critical editions of these texts has often been stated by canonists and historians alike. It was given formal expression in a resolution passed by the international Convention which was organized, in April 1952, by the University of Bologna to commemorate the eighth centenary of Gratian. The same need was specifically referred to in the allocution of His Holiness Pope Pius XII to the canonists, on April 22, 1952.

The foundation of the Institute was made possible by the generous aid of American benefactors. It is governed by a board of directors, consisting of the Hon. John J. Burns (New York), Rev. Professor John Tracy Ellis (Washington), Professor Stephan Kuttner (Washington), Professor Gaines Post (Madison, Wis.), Rev. Dr. J. Joseph Ryan (Brighton, Mass.), Dr. Theodore H. Thiesing (New York), and Mr. Eugene P. Willging (Washington). Dr. Kuttner, elected as president for a term of five years, is in charge of directing the policies and research of the Institute. The board has appointed Dr. Brian Tierney (Washington) as assistant secretary. The Institute has its headquarters at 620 Michigan Avenue, N.E., Washington 17, D. C., in offices placed at its disposal by The Catholic University of America.

Pledged to close collaboration with scholars and research centers on both sides of the Atlantic, the Institute will enjoy the counsel of an international Board of Advisers * and the cooperation of

* Anselmo M. Albareda, O.S.B. (Vatican Library), Ramon Bidagor, S.J. (Gregorian University, Rome), Lowrie J. Daly, S.J. (St. Louis University), Giuseppe Forchielli (University of Bologna), Gérard Fransen (University of Louvain), Walther Holtzmann (German Historical Institute, Rome), Richard W. Hunt (Bodleian Library, Oxford), Ernst H. Kantorowicz (Institute for Advanced Study, Princeton), Gabriel Le Bras (University of Paris), Terence P. McLaughlin, C.S.B. (Pont. Institute of Mediaeval Studies, Toronto), Charles R. D. Miller (Mediaeval Academy of America), Klaus Mörsdorf (University of Munich), Willibald M. Plöchl (University of Vienna), Roscoe

corresponding members and other collaborating scholars from many lands. It will thus function as the coordinating center of what may be termed an International Cooperative based on agreements with individual scholars and institutions of learning; it will work out, in constant consultation with its collaborators, the methods to be applied in preparing the editions of texts, and assume responsibility for the technical standards of all work released for publication. It will act as a clearing house and center of information for all problems connected with the study and critical evaluation of the medieval manuscripts of canon law. To this end, a comprehensive collection of microfilms, an elaborate card index, and similar research tools are being assembled at the Institute.

The aims and organization of the Institute have met from the outset with warm support on the part of the Holy See. Pope Pius XII, upon having been informed of its foundation, has favored the Institute by expressing in a personal message, sent through the Papal Secretariat of State, "His gratification and encouragement."

During the Tenth International Congress of Historians, held at Rome in September 1955, a first meeting of the president of the Institute with a representative group of collaborating scholars from nine countries took place on September 6th in the Vatican Library, where His Em. Card. Mercati extended it a gracious welcome. The meeting settled many methodological and organizatorial problems and agreed on an outline of concrete projects for the immediate future.

In view of the immense wealth of unedited manuscript material of medieval canon law, a certain limitation of the Institute's general program is inevitable. The Institute does not exclude from its purview the study of canonical collections prior to Gratian, but will primarily concentrate on the writings of the classical period, especially the century between Gratian and Gregory IX. In this field, the new edition of the Decretum and the editions of the works of the glossators (decretists and decretalists) will form two distinct projects. The Institute will also lend its support to Professor

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Pound (Harvard University), Jacqueline Rambaud-Buhot (Bibliothèque Nationale, Paris), Edward G. Roelker (Catholic University of America), Alfons M. Stickler, S.D.B. (Pont. Ateneo Salesiano, Turin), Samuel E. Thorne (Yale University), Walter Ullmann (University of Cambridge), William C. Warren (Columbia University).

Holtzmann's project of a corpus of twelfth-century decretals, sponsored by the Academy of Göttingen, and promote the equally needed research in the decretal collections of the thirteenth century.

The major publications sponsored by the Institute will take the form of a series with the title *Monumenta iuris canonici.* The collection will be divided into three sections, *Corpus collectionum, Corpus glossatorum, Subsidia.* Individual volumes of the series, when published with the assistance of a collaborating institution, will be furnished with a double title page indicating the joint sponsorship of this particular institution and the Institute.

By arrangement with Fordham University Press, New York, the annual volumes of *Traditio: Studies in Ancient and Medieval History, Thought and Religion* will include in the future a new section, "Bulletin of the Institute of Research and Study in Medieval Canon Law," for the regular publication of articles and information relating to the work of the Institute. Offprints will be made separately available to collaborators and others interested in the activities of the Institute. The first of these bulletins has already been published (*Traditio* 11 [1955] 429-448); it contains *inter al.* a detailed list of over twenty medieval works at present assigned for critical edition to individual collaborators, an outline of methodological principles, and a checklist of manuscripts relevant to the present state of the project.

The Institute was solemnly inaugurated on May 19, 1956, with a Mass celebrated by the Most Rev. Bryan J. McEntegart, Rector of The Catholic University of America, a sermon by the Most Rev. Amleto G. Cicognani, Apostolic Delegate to the United States, and the opening of an exhibition of manuscripts and incunabula, lent for the occasion by the Library of Congress, the Pierpont Morgan Library, the Walters Art Gallery, and the libraries of The Catholic University of America and Harvard Law School.

THE RICCOBONO SEMINAR OF ROMAN LAW IN AMERICA

Academic Years 1954-1955 and 1955-1956

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Stephan Kuttner, J.U.D., S.J.D. (Bonon), J.C.D. (Lovan), Professor of the History of Canon Law, The Catholic University of America.

Papers read:

December 17, 1854: Dr. Edgar Bodenheimer: "The Public Policy Exception in Private International Law: A Reappraisal in the Light of Legal Philosophy."

May 19, 1955: Dr. A. Arthur Schiller: "Comparative Law, Legal History and the Continuity of Legal Institutions in Antiquity."

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May 8, 1956: Dr. Fritz Pringsheim, Professor Emeritus of Law, Freiburg i.B: "Relations between Greek and Roman Law."

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